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## Advocacy and Diplomacy in the Great Lakes: A Case History of Non-Governmental-Organization Participation in Negotiating the Great Lakes Water Quality Agreement

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## ADVOCACY AND DIPLOMACY IN THE GREAT LAKES: A CASE HISTORY OF NON- GOVERNMENTAL-ORGANIZATION PARTICIPATION IN NEGOTIATING THE GREAT LAKES WATER QUALITY AGREEMENT\*

JACK MANNO\*\*

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\* This article describes and analyzes the role of non-governmental organizations, or NGOs, in the system of governance that has developed to manage the use of natural resources, and that management's impact on the Great Lakes ecosystem. Particular emphasis is given to the organizational history of one such NGO, Great Lakes United, and its actions and strategies in relation to the Canada-U.S. Great Lakes Water Quality Agreements, and to the negotiations leading to the 1987 Protocol to the Agreements. My more general purpose is to contribute to the development of a literature of NGO case histories in order to provide an empirical grounding on which to build an understanding of the role of NGOs in world environmental politics. Using this case history and the limited literature on similar cases, I also venture some preliminary conclusions about why, and under what conditions, NGOs may have the greatest impact on international environmental affairs.

This case history explores a particular aspect of Canadian-U.S. relations, i.e., the Great Lakes Water Quality Agreement. It is in large part the result of my participation in a two-year project to study the role of NGOs in world environmental politics in order to advance the scholarly understanding of, and develop teaching materials for, international environmental studies. This project was supported in part by a grant from the Canadian Studies Grant Program of the Canadian Consulate in the U.S. An earlier version of this article was incorporated as the central narrative of a teaching case developed for a Masters thesis in Environmental Studies by Anne Marie McShea, a Graduate Assistant with the Great Lakes Research Consortium.

This article is adapted from Jack Manno, *Negotiating the Great Lakes Water Quality Agreement*, in TRANSFORMATIVE ENVIRONMENTAL NGOS AND WORLD POLITICS (Thomas Princen & Mathias Finger eds., forthcoming 1992).

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## I. INTRODUCTION

On September 24, 1987, John Jackson, then Vice President of Great Lakes United (GLU), received a letter from Canada's Secretary of State for External Affairs, Joe Clark. The letter was in response to a series of letters GLU had sent to Environment Canada and External Affairs asking the Canadian government to include representatives of environmental interest groups in the delegation to bilateral talks with the United States over proposed revisions to the Canada-United States Great Lakes Water Quality Agreement.<sup>1</sup> Similar requests had been made by Great Lakes United members in the United States to the appropriate authorities there. Joe Clark's letter read, in part:

With respect to your request for observer status at the bilateral review, you will appreciate that the presence of a [binational] non-governmental group at the formal review of an international agreement by its signatories raises some interesting issues of propriety and precedent. Nonetheless, in view of Great Lakes United's credentials as a serious and responsible group, and our collective interest in ensuring the best possible review of the Agreement, I am pleased to invite you and one

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1. Great Lakes Water Quality Agreement of 1978, Nov. 22, 1978, U.S.-Can., 30 U.S.T. 1383 [hereinafter 1978 GLWQA] (*revising* Great Lakes Water Quality Agreement of 1972, Apr. 15, 1972, U.S.-Can., 23 U.S.T. 301).

other member of the Canadian section of Great Lakes United to participate as observers to the Canadian delegation.<sup>2</sup>

This case history explores some of the issues of propriety and precedent referred to by Secretary Clark. These issues not only have a bearing upon Canadian-U.S. relations, but also reflect similar issues raised elsewhere in international environmental relations. Non-governmental organizations are increasingly insisting on the importance and value of their participation.<sup>3</sup> This inquiry into the participation of a non-governmental organization (NGO)<sup>4</sup> in bilateral Great Lakes

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2. Letter from Joe Clark, Secretary of State for External Affairs, Canada, to John Jackson, Canadian Vice President, *Great Lakes United* (Sept. 24, 1987) [hereinafter Joe Clark Letter] (on file with the *Buffalo Environmental Law Journal*).

3. See generally LYNTON K. CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS* (2d ed. 1990); ORAN R. YOUNG, *INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT* (1989).

4. In the United Nation's system, where the term originates, "non-governmental organization" designates any organization which has registered its interest in the issues before the United Nations, has received accreditation from a United Nations body, and is not part of a government body or legally constituted international organization. Many of these organizations have as their primary mission the promotion of internationalism and international institutions; others have played a role in international development policy and in monitoring human rights agreements. The class of specifically environmental NGOs is a rapidly growing newcomer to the U.N. system. See *NGOs at UNCED and its Parallel Events*, E & D FILE 1992: BRIEFINGS FOR NGOS ON UNCED (United Nations Non-Governmental Liaison Service), July 1992 [hereinafter E & D FILE]. A formal procedure has been developed to obtain credentials as an NGO through the United Nation's Economic and Social Council (ECOSOC). The recent United Nations Conference on Environment and Development (UNCED) accredited over 1,000 NGOs to its preparatory process and the meetings in Rio de Janeiro, Brazil. See Mathias Finger, *NGOs in the UNCED Process*, in *TRANSFORMATIVE NGOS AND WORLD POLITICS* (Thomas Princen & Mathias Finger eds., forthcoming 1992). UNCED facilitated NGO participation with a special NGO-liaison office. In the nascent literature of international environmental affairs, the term NGO is frequently used rather loosely to refer to any and all environmental advocacy organizations operating in the realm of international politics. Such usage may confuse matters by leading to conclusions about the role and influence of NGOs when what is really being described is only one type of NGO, that composed of environmental advocates and international conservation organizations. The conclusions may or may not hold true for the variety of business organizations, such as the International Chamber of Commerce, and service organizations, such as the International YMCA, which are also accredited by the U.N. as NGOs. See E & D FILE, *supra*. In the context herein, it may be preferable to drop the term NGO and refer to the organizations individually by name. However, one of the purposes of this article is to draw lessons from the case that may be applicable to the broader field

negotiations creates an opportunity to empirically examine the development of NGO strategies, cross-sectoral dynamics, internal organizational development, and the relationships between institutions and ecosystems. Observations and personal records of the participants, as well as the historical record of joint Canadian-U.S. efforts to manage and protect the Great Lakes, suggest conclusions which may be useful for understanding other cases in which NGOs play a critical role in international environmental relations.

Non-governmental organizations may be remapping the terrain of international environmental affairs, but studies of international environmental relations are still mostly presented from the perspective of national governments and through the lens of academic study.<sup>5</sup> This study, by contrast, is a narrative and interpretive history of the role played by NGOs in the events leading to the adoption of the 1987 Protocol to the Great Lakes Water Quality Agreement.<sup>6</sup> We cannot hope to understand Canadian-U.S. environmental relations without considering the policies, strategies, and actions of the NGOs involved. Furthermore, the NGOs themselves cannot be understood without placing the evolution of their influence and their organizational development within the context of binational relations and regional politics. Most importantly, neither the NGOs nor states can be understood apart from the geographic circumstances and the changing ecological characteristics of the Great Lakes basin. Those geographic realities ultimately shape the region's economies, demarcate its political boundaries, and affect all enterprises within their realm.

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of international environmental affairs. Most of the organizations involved on the international stage are self-identified as NGOs. In this article, the term "NGO" refers to a non-profit organization with bases or activities in more than one country, which is unaffiliated with governments, which does not primarily promote the objectives of governmental or corporate interests except when consistent with the NGO mission, and which is involved in international environmental decision-making forums where the recognized parties are nation-states. In particular, NGOs in the Great Lakes region are the three organizations invited as observers to the 1987 negotiations to the GLWQA: The Sierra Club, the National Wildlife Federation, and Great Lakes United.

5. The growing significance of NGOs in international environmental relations has been generally recognized within the field of international relations. See, e.g., CALDWELL, *supra* note 3. However, much of the literature and historical accounts to date on specific international environmental relations treat NGOs as secondary or peripheral actors outside the international regime. The overall significance of NGOs in international affairs is dealt with by Princen & Finger, *supra* note 4.

6. 1987 Protocol Amending the Great Lakes Water Quality Agreement of 1978, Nov. 18, 1987, U.S.-Can., Hein's No. KAV 255 [hereinafter 1987 Protocol].

The Great Lakes and St. Lawrence River comprise the world's most extensive boundary waters and the world's largest system of fresh surface water, draining nearly 200,000 square miles of land.<sup>7</sup> For several centuries the Great Lakes region was a powder keg of tensions. The French and British militaries, American and Canadian settlers, and the North American indigenous nations all competed for navigational access to the continent's interior and for control over its abundant fur-bearing animals and other sources of wealth. By the twentieth century, political power in the region was concentrated in the British Commonwealth government of Canada and the government of the United States.<sup>8</sup> By the turn of the century, the two sovereigns had begun to focus on cooperation, at first to recognize each other's rights to peaceful navigation, then later to respond to what was becoming a large-scale pollution catastrophe.<sup>9</sup>

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7. For an overview of the geographical and environmental characteristics of the Great Lakes, see WILLIAM ASHWORTH, *THE LATE, GREAT LAKES: AN ENVIRONMENTAL HISTORY* (1986).

8. The relationships between the federal capitols and their respective states and provinces differ significantly between the U.S. and Canada, particularly with regard to natural resources and pollution control. Canadian provinces have greater control over water resources than the state governments in the U.S. This has required intergovernmental agreement between Canadian federal and provincial powers prior to bilateral or international agreements which impact on provincial resources. For example, the 1971 Canada-Ontario Agreement preceded the U.S.-Canada 1972 Great Lakes Water Quality Agreement. "The reality is that power under the constitution is in federal hands in one nation [U.S.] and in provincial hands in the other [Canada]." JOHN E. CARROLL, *ENVIRONMENTAL DIPLOMACY: AN EXAMINATION AND A PROSPECTIVE OF CANADIAN-U.S. TRANSBOUNDARY ENVIRONMENTAL RELATIONS* 30 (1983) [hereinafter *ENVIRONMENTAL DIPLOMACY*]. For a general overview of constitutional and legislative differences regarding pollution control and the Great Lakes, see *id.* at 29-38, 130-131. See also John E. Carroll, *Differences in the Environmental Regulatory Climate of Canada and the United States*, 4 *CAN. WATER RESOURCES J.* 16, 16-25 (1979). These differences have affected the development of environmental NGOs in each country. Canadian groups have concentrated their efforts at the provincial and regional levels, while U.S. organizations have concentrated on influencing Washington. Great Lakes United and the Sierra Club organize an annual Great Lakes Week in Washington but have not done the same in Ottawa.

9. U.S.-Canadian bilateral cooperation regarding the Great Lakes was first formalized by the 1909 Boundary Waters Treaty, which established navigational rights, responsibilities, and institutional arrangements for the resolution of disputes over boundary waters. Treaty Relating to Boundary Waters and Boundary Questions, Jan. 11, 1909, U.S.-Gr.Brit. (for Can.), 36 Stat. 2448 [hereinafter *Boundary Waters Treaty*]. Together, the Boundary Waters Treaty and The International Joint Commission, a quasi-supranational binational commission established by the Treaty, have evolved to provide a framework for bilateral environmental cooperation between the U.S. and Canada regarding the Great Lakes.

Since 1972, the Great Lakes Water Quality Agreement (GLWQA)<sup>10</sup> has served as the reference point for cooperative action to reverse trends of deteriorating water quality. The GLWQA is, according to the International Joint Commission, a "milestone document, one of the first international statements that technical, diplomatic, and administrative approaches to resource management need to be considered in terms of holistic ecological concepts."<sup>11</sup> These holistic ecological concepts are manifested in the U.S.-Canada Great Lakes Water Quality Agreement in four ways. First, acceptance of a common definition of the concept of a Great Lakes Basin ecosystem, one which includes human beings and adopts the concept of ecosystem integrity as the goal for environmental restoration. Second, reliance on government intervention in the form of ecosystem planning across jurisdictional boundaries. Third, the GLWQA recognized that biological and ecological processes interact with physical and chemical processes to bioconcentrate particular classes of persistent toxic compounds, defined as "critical pollutants," requiring extraordinary regulation. Finally, holistic ecological concepts were implemented by the GLWQA through recognition that land use practices in one part of the Great Lakes basin could significantly affect ecosystem quality in more downstream, distant parts.

These concepts have evolved over the life of the Agreement. For example, the scope of the 1972 GLWQA was largely determined by national boundaries rather than by ecological parameters.<sup>12</sup> However, the GLWQA is an example of an evolving governance structure, reflecting a process of change through experimentation and response. Research undertaken following the 1972 GLWQA established the basis for the ecosystem approach which was embodied in the Great Lakes Water Quality Agreement of 1978.<sup>13</sup>

An atmosphere of change in Great Lakes institutional arrangements was encouraged by many forces, e.g., biophysical alterations of the ecosystem; improvements in scientific understanding of ecology, toxicology, limnology, and other relevant sciences; changing political realities; and the evolution of concepts and laws concerning

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*Id.* art. VII, 36 Stat. at 2451.

10. Great Lakes Water Quality Agreement of 1972, Apr. 15, 1972, U.S.-Can., 23 U.S.T. 301 [hereinafter 1972 GLWQA].

11. International Joint Commission, SECOND BIENNIAL REPORT UNDER THE GREAT LAKES WATER QUALITY AGREEMENT OF 1978 TO THE GOVERNMENTS OF THE UNITED STATES AND CANADA AND THE STATE AND PROVINCIAL GOVERNMENTS OF THE GREAT LAKES BASIN 13 (1984) [hereinafter IJC SECOND BIENNIAL REPORT].

12. 1972 GLWQA, *supra* note 10, art. I, 23 U.S.T. at 303.

13. 1978 GLWQA, *supra* note 1.

governmental responsibility for the health of ecosystems and public participation in decisions. These forces, both environmental and social, are expressed through changes in the institutional structures of governance. The process of change through experimentation and response is sometimes referred to as "social learning." The evolving Great Lakes governance structure is one example of complex partnerships being experimented with throughout the world.<sup>14</sup>

The Canada-U.S. 1978 GLWQA, with its espousal of an "ecosystem approach" to environmental protection, has been promoted as a model for global institutional arrangements.<sup>15</sup> In fact, the Great Lakes experience may be a model of sorts; lessons drawn from it may be beneficially applied to other shared ecosystems and the biosphere as a whole.

Issues concerning management of a shared ecosystem have at times seemed to dominate Canadian-U.S. relations. The complex of organizations and individuals involved in Great Lakes water quality activities is an evolving governance structure<sup>16</sup> comprised of bilateral institutions;

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14. Many of the world's largest lake basins and over 200 river basins cross international boundaries. Notable international commissions for water resource management include the International Commissions for the Protection of the Rhine, Niger River Commission, Lake Chad Basin Commission, and the Mekong River Basin. Naturally, each is differentiated by its political and ecological context. For a comparative examination of the institutional arrangement in the Great Lakes and other international basins, see Dante A. Caponera, *Patterns of Cooperation in International Water Law*, 25 NAT. RESOURCES J. 563 (1985). See also Ludwik A. Teclaff & Eileen Teclaff, *Transboundary Toxic Pollution and the Drainage Basin Concept*, in TRANSBOUNDARY RESOURCES LAW 27-50 (Albert Utton & Ludwik A. Teclaff eds., 1987); CALDWELL, *supra* note 3, at 129-67.

15. The International Joint Commission Science Advisory Board, in its 1989 Report to the IJC, declared that "[t]he significance of the 1978 Great Lakes Water Quality Agreement lies in its strong affirmation of the need for an integrated ecosystemic social-economic-environmental approach to problem solving." SCIENCE ADVISORY BOARD, INTERNATIONAL JOINT COMMISSION, 1989 REPORT 74 (1989) [hereinafter SCIENCE ADVISORY REPORT]. The Board went on to suggest that cooperative institutional arrangements which have evolved to implement the Great Lakes Water Quality Agreement may serve as a model for international cooperation on biospheric problems. *Id.* On a more regional level, institutional arrangements in the Great Lakes have been widely noted as a model of basin-wide water resource management. See generally CAPONERA, *supra* note 14.

16. This governance structure may be referred to as an international regime for national resources, as used by Oran R. Young, who defines a regime as "social institutions governing the actions of those involved in specifiable activities or sets of activities. Like all social institutions, they are practices consisting of recognized roles linked together by clusters of rules or conventions governing relations among the occupants of these roles." YOUNG, *supra* note 3, at 12.



federal, state and provincial agencies; the "expert community"<sup>17</sup> of professional and informal networks of scientists; environmental advocates; native activists; financial, industrial, and tourism interests; hunters and anglers; the press; and others. Within this governance structure, private non-governmental organizations play a major role.

In examining the international relevance of the Canadian-U.S. Great Lakes relationship, the growing influence of non-governmental organizations in both domestic and binational Great Lakes policy-making stands out. Environmental NGOs have played an important role, particularly in the last decade, in defining the issues in both countries and determining the bilateral institutional responses to those issues.

In 1989 the International Joint Commission wrote in its Fifth Biennial Report on Great Lakes Water Quality:

The emergence of strong, sophisticated and effective non-governmental organizations over the past decade has been a positive development. Composed of many thousands of Great Lakes basin residents and others from both sides of the international boundary, these organizations are important in focusing political attention on the integration of Agreement objectives into domestic priorities and programs. They are instrumental in encouraging governments to provide the resources necessary to implement the Agreement and actively promoting environmentally conscious behavior among their own membership and the public at large. As such, these organizations fill a distinct niche in the Great Lakes institutional framework . . . .<sup>18</sup>

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17. "Expert community" means generally that informal system of professionals with environmental expertise who serve governments, universities, non-governmental organizations, and international agencies, and who share a common vocabulary and international scientific culture. One commentator has termed this an "epistemic community." PETER HAAS, *SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION* 52-63 (1990). For a thorough treatment of the role of science and epistemic communities in resource management, see generally *INTERNATIONAL RESOURCE MANAGEMENT: THE ROLE OF SCIENCE AND POLITICS* (Steinar Andresen & Willy Ostreng eds., 1989) [hereinafter *INTERNATIONAL RESOURCE MANAGEMENT*].

18. *INTERNATIONAL JOINT COMMISSION, FIFTH BIENNIAL REPORT UNDER THE GREAT LAKES WATER QUALITY AGREEMENT OF 1978 TO THE GOVERNMENTS OF THE UNITED STATES AND CANADA AND THE STATE AND PROVINCIAL GOVERNMENTS OF THE GREAT LAKES BASIN* 4 (1989) [hereinafter *IJC FIFTH BIENNIAL REPORT*].

This study focuses on the formal bilateral review of the GLWQA and the negotiations leading to the 1987 Protocol.<sup>19</sup> Perhaps one of the most significant aspects of the negotiations does not actually appear in the document signed by the Parties: that is, the manner in which the review and amendment negotiations were carried out. For the first time in the long history of formal Great Lakes negotiations, representatives of three non-governmental organizations—Great Lakes United, the Sierra Club, and the National Wildlife Federation—were invited by the U.S. State Department to participate as observers of the U.S. delegation. Likewise, the Canadian Ministry of External Affairs invited two representatives of Great Lakes United to serve as observers on the Canadian delegation.

As we shall see, the Great Lakes United representatives and the other observers did far more than observe. They were thoroughly involved in discussing every aspect of the Agreement. They brought with them a high degree of technical knowledge and an ability to articulate technically-supported positions. The NGO observers had the advantage of being part of a binational network of advocates. They were thoroughly familiar with the proposals from both Parties, and the internal politics of each, and therefore, they had a deep understanding of the various proposals. In the end, the new Annexes added to the GLWQA were significantly shaped in both wording and intent by the persuasive efforts of the NGOs, despite their status as mere observers. The efforts of the NGOs gave political expression to several long-standing recommendations which had arisen from International Joint Commission boards and other forums (such as the Anticipatory Planning Workshop, the Pollution from Land-Use Activities Reference Group (PLUARG), and the Hiram Workshop On Implementing the Ecosystem Approach) held over the previous decade.<sup>20</sup>

For example, the NGOs placed on the agenda, and won requirements for, public participation in GLWQA implementation, particularly in the remedial plans required by Annex 2.<sup>21</sup> They argued for and won stricter and narrower definitions of "point source impact zones," as defined in Article IV,<sup>22</sup> insisting that no exceptions for industrialized embayments be made to the Parties' commitment to the virtual elimination of persistent toxic substances throughout the Great Lakes ecosystem. NGO representatives also successfully supported a redefini-

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19. See 1987 Protocol, *supra* note 6.

20. Interview with Michael J. Donahue, Executive Director, Great Lakes Commission, in Ann Arbor, Mich. (Oct. 21, 1991).

21. 1987 Protocol, *supra* note 6, Annex 2(e)(2).

22. 1987 Protocol, *supra* note 6, art. IV.

tion of critical pollutants and the elimination of gender-specific language from the GLWQA. In addition to these changes, the range of subjects covered under the amended Agreement's provisions was expanded, partly as a result of the NGO efforts, to include airborne pollutants, pollution from agricultural and land use activities, and contaminated groundwater and wetlands protection. Perhaps most importantly, the presence of the NGO delegation helped prevent political mischief in the form of last minute alterations to the Protocol text.

There was one additional result of the 1987 Protocol which apparently had not been anticipated fully by the Parties or the NGOs: the weakening of the International Joint Commission (IJC) as an international institution. The NGOs seem to have had little appreciation for the role the IJC and its "sub-Commissions" played as a force for moral suasion. NGO consideration of the IJC during the process leading to the 1987 Protocol was mostly limited to criticism of the Commission's lack of implementation authority. The negotiators accepted the recommendations of several observers that government accountability be built into the GLWQA. As a result, the new Annexes clearly charge the Parties with the responsibility for implementation and reporting on progress. The ensuing agreement led to a new binational committee structure which duplicated the existing set of IJC boards and committees. This new structure, coupled with NGO criticisms that government members of the IJC boards were being compromised by conflicts of interests, led the IJC Commissioners in 1991 to dissolve the committee structure, effectively terminating an important intergovernmental forum.<sup>23</sup>

What follows is a brief examination of the history of U.S.-Canadian affairs pertaining to the Great Lakes, within the context of the development of Great Lakes United, one of the three NGOs that was granted observer status at the 1987 Protocol negotiations. This case study concludes with the suggestion that this particular NGO experience could well serve as a paradigm in the larger world of international environmental negotiations.

## II. BACKGROUND OF THE GREAT LAKES WATER QUALITY AGREEMENTS

### A. *Initial Setting*

The negotiating history leading to the GLWQA dates back to the late 19th century, when significant advances were made in waterworks

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23. Telephone Interview with Kent Fuller, Senior Advisor, Environmental Protection Agency, Great Lakes National Program Office (Sept. 28, 1991); Interview, in Ann Arbor, Mich. (Oct. 21, 1991).

engineering and economic development. Along with advances in technology came plans for constructing major works with the potential for altering parts of the Great Lakes hydrological system. Proposed canals and dams raised concerns about water resource rights. Potential and actual disputes over such rights recurred often and were handled through a cumbersome series of diplomatic exchanges between the U.S. State Department and Dominion authorities in the British Government.<sup>24</sup>

Minor disputes festered due to the lengthy diplomatic correspondence between London and Washington. A proposal for a Chicago Drainage Canal to divert Lake Michigan water into the Mississippi River Basin and another for a dam at the outlet of Lake Erie were two of the most controversial. Both were initiated on the U.S. side with little consideration given to the possible impact on Canadian rights and resources.<sup>25</sup>

Dominion representatives pressed for a treaty that would protect Canadian interests which they felt were constantly being pitted against U.S. economic might. Canada sought a strong treaty enforced by a commission with wide-ranging authority. The U.S., however, preferred measures which would not impinge on national sovereignty rights. The Boundary Waters Treaty of 1909<sup>26</sup> was the compromise result. It established a body, the International Joint Commission (IJC), empowered to act only upon those cases jointly referred to it by the Parties. It held no authoritative powers over the two participating countries to ensure compliance with its recommendations.<sup>27</sup>

Still, its structure did offer a unique approach to international problem solving. The six Commissioners, three Canadian and three

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24. At the turn of the century, bilateral disputes surrounded development of the St. Lawrence Seaway for navigation, unilateral construction of the Chicago Diversion Canal, the St. Mary River milk irrigation project and hydroelectric project, as well as proposals for the St. Mary River at Sault Ste. Marie in Michigan and Ontario. CARROLL, *ENVIRONMENTAL DIPLOMACY*, *supra* note 8, at 40.

25. See generally N.F. Dreizinger, *Dreams and Disappointments*, in *THE INTERNATIONAL JOINT COMMISSION: SEVENTY YEARS ON* (Robert Spencer et al. eds., 1988).

26. *Boundary Waters Treaty*, *supra* note 9.

27. This institutional arrangement has had considerable influence on the limited capacity of the International Joint Commission to implement the Great Lakes Water Quality Agreements and gain compliance on the terms of the Agreements. It has been a recurring issue for the IJC and proponents of a more centralized supranational authority. This limitation on authoritative power also differentiates the IJC, and thus the Great Lakes ecosystem approach, from other international basins employing a basin-wide management approach, such as Europe's Rhine River. See Caponera, *supra* note 14, at 572-86.

American, were expected to represent the Commission, not their home countries. Decisions were to be made by consensus and, to insulate commissioners from political pressure, no record was kept of the decision-making process itself.<sup>28</sup> The failings of the IJC have not been caused by disputes between the Parties, because almost every decision has indeed been made by consensus. Rather, shortcomings have resulted from the complex and difficult problems inherent in the Great Lakes ecosystem itself. With the limited powers and resources the Commission possesses, it has had to provide solutions and gain cooperation from the Parties. The evolution of these issues and institutional arrangements is central to understanding the significance of the 1987 Protocol and the precedent set by environmental NGO involvement.

### B. *Great Lakes Water Pollution: A Catalyst for Change*

Interest in water pollution antedated the 1909 Boundary Waters Treaty. At the time, typhoid fever was a major health problem in the U.S. and Canada, and a clear link had been established between polluted water and the spread of typhoid.<sup>29</sup> Investigative studies conducted in the Great Lakes Region suggested the need for public health legislation.<sup>30</sup> As a result, the Boundary Waters Treaty addressed water pollution in Article IV: "It is . . . agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."<sup>31</sup> This Article has grown in importance immensely since 1909. It provided the basis for IJC investigations into water pollution and water quality issues and eventually it provided the rationale for the GLWQA.<sup>32</sup>

The IJC received its first reference to investigate water pollution in 1913. Following investigative studies, both the U.S. and Canadian

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28. Boundary Waters Treaty, *supra* note 9, art. X, 36 Stat. at 2453.

29. PHIL WELLER, FRESH WATER SEAS: SAVING THE GREAT LAKES 59 (1990).

30. *Id.* at 60.

31. Boundary Waters Treaty, *supra* note 9, art. IV, 36 Stat. at 2450.

32. The International Joint Commission 1970 Reference Report, which provided impetus for the 1972 Great Lakes Water Quality Agreement, cited pollution in the lower Great Lakes which was in contravention of the 1909 Boundary Waters Treaty. See NATIONAL RESEARCH COUNCIL OF THE UNITED STATES AND THE ROYAL SOCIETY OF CANADA, THE GREAT LAKES WATER QUALITY AGREEMENT: AN EVOLVING INSTRUMENT FOR ECOSYSTEM MANAGEMENT 20-23 (1985) [hereinafter NRC-RSC Report].

Commissioners issued preliminary reports that were dramatic in their urgency. The language expressed deep concern: "[The] situation along the frontier which is generally chaotic, everywhere perilous and in some cases disgraceful . . . [and the conditions] imperil the health and welfare of the citizens . . . in substantial contravention of the spirit of the Treaty . . . ."<sup>33</sup>

The Commission's 1918 reference report cited sewage from vessels, cities, and industries as a major cause of the pollution problem. To address the pollution problem, the Commission requested that it be given sweeping powers to regulate and prohibit sewage pollution.<sup>34</sup> The governments' response was a request to the Commission that it draft a water quality treaty. By 1920, however, after widespread acceptance of water filtration and chlorination had greatly reduced typhoid fever, the urgency of eight years earlier had dissipated, and the momentum for a water pollution treaty was lost.<sup>35</sup> The spread of typhoid fever had been a dramatic, high-profile water pollution crisis. The adoption of widespread public health measures in cities around the basin effectively removed water quality issues from the binational agenda for the next two decades. However, the processes of ecosystem degradation continued despite progress in protecting humans from waterborne diseases.<sup>36</sup>

From the time of European settlement, human-induced stress on the Great Lakes accelerated to the verge of ecosystem crisis. Logging throughout the basin raised water temperatures and choked the tributaries with the silt of eroded riverbanks. When streams were dammed for mills, salmon lost access to spawning grounds and habitat. Unrestrained fishing drove the populations of top predator species to unsustainable levels. The Welland Canal provided access to the upper lakes for sea lamprey from Lake Ontario. Seagoing vessels brought in a myriad of other organisms. The cold water fishery was further

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33. International Joint Commission, *Final Report on the Pollution of Boundary Waters Reference 31, 51* (1918), quoted in *THE GREAT LAKES OF THE UNITED STATES AND CANADA: A READER ON MANAGEMENT IMPROVEMENT STRATEGIES* 48 (Leonard B. Dworsky & Charles F. Swezey eds., 1974) [hereinafter *MANAGEMENT IMPROVEMENT STRATEGIES*].

34. See INTERNATIONAL JOINT COMMISSION, *FINAL REPORT ON THE POLLUTION OF BOUNDARY WATERS* (1918).

35. See JOHN DUFFY, *THE SANITARIANS: A HISTORY OF AMERICAN PUBLIC HEALTH* 202 (1990).

36. WELLER, *supra* note 29, at 61-66.

devastated by oxygen depletion brought on by algal blooms stimulated by sewage and other inadvertent forms of fertilizer.<sup>37</sup>

By the time the general public took serious notice of the trauma to the ecosystem in the 1960s, the momentum of large system modification had already caused considerable damage. Scientific concern for the health of the lakes and public demand for action prompted the governments of Canada and the U.S. to ask the IJC in 1964 for a study of water pollution problems in the lower lakes: Erie, Ontario, and the St. Lawrence. The study took six years to complete, but the IJC's conclusions in 1970 recommended an international cleanup effort, and urged the governments to develop programs to reduce phosphorus inputs and to agree on controls and/or regulations for several pollution sources. Those six years also saw a dramatic outpouring of public concern about the environment.<sup>38</sup>

Negotiations leading to the Great Lakes Water Quality Agreement of 1972 began almost immediately after the governments received this report. By that time, major fish die-offs, beach closings, mounds of rotting seaweed, eutrophication from sewage and fertilizer pollution, and river surfaces that actually caught fire, were evident. These visible results served as the motivating backdrop for the GLWQA negotiations.

### C. *The 1972 Great Lakes Water Quality Agreement*

In the 1972 GLWQA the Parties expressed their determination to "restore and enhance water quality in the Great Lakes System."<sup>39</sup> The Agreement also gave the IJC additional responsibilities for collecting, analyzing, and disseminating information on the operations and effectiveness of government programs to improve the water quality of the Great Lakes. Also, it tendered advice and recommendations to federal, state, or provincial governments for dealing with water quality problems, and assisted in the coordination of joint efforts to control pollution, including the discharge of phosphorus into the lakes.<sup>40</sup>

These new powers, in effect, constituted a permanent reference. The Commission was no longer required to wait for the Parties to refer specific questions to it before commenting, criticizing, and offering advice. In order to carry out its new functions under the GLWQA, two

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37. SEA GRANT INSTITUTE, UNIVERSITY OF WISCONSIN, 1984-86 BIENNIAL REPORT 1-11 (1986).

38. For documented examples of the growth of public concern, see WELLER, *supra* note 29, at 89-93. See also ASHWORTH, *supra* note 7, at 123-48.

39. 1972 GLWQA, *supra* note 10, 23 U.S.T. at 302.

40. *Id.* arts. V, VI, 23 U.S.T. at 305, 308.

new binational IJC boards were established: the Water Quality Board and the Great Lakes Science Advisory Board. The Water Quality Board serves as the principal advisor to the IJC on all matters pertaining to the GLWQA.<sup>41</sup> The Science Advisory Board serves the broader, less focused purpose of advising the Commissioners on research and scientific matters and calling attention to new and emerging issues.<sup>42</sup>

The new boards made available to the Commission a source of technical and managerial expertise, allowing the commissioners to broadly comment on the biennial reports they issued under the GLWQA. Research and reports completed by the boards did more than inform the Commission. Their work clarified and documented the causes of water pollution, and recommended government action. The boards also stimulated and became part of a new web of working relationships among U.S. and Canadian natural scientists, ecologists, bureaucrats, and policy scholars with links to both governments and the new environmental NGOs of the 1970s.<sup>43</sup> The seeds of this new "expert community" were sown in earlier collaborative efforts. Such efforts include the Northington study of Lake Erie begun in 1960, work done under the 1964 U.S. Water Resources Research Act, preparation for the 1972 International Field Year on the Great Lakes, and the Canada-United States University Seminar (CUSIS).<sup>44</sup>

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41. The Water Quality Board is composed of nine American and nine Canadian managers of pollution control programs appointed by the Commissioners on recommendation from the government agencies. See INTERNATIONAL JOINT COMMISSION, 70 YEARS OF ACCOMPLISHMENT: REPORT FOR THE YEARS 1978-1979 21-22 (1980).

42. A new addition to the structure of the International Joint Commission has been the Council of Great Lakes Research Managers, originally set up to serve the Science Advisory Board as a direct connection to those responsible for prioritizing and funding research on Great Lakes problems. In the most recent reorganization of the IJC committee structure, the Council was raised in status to equivalency with the Water Quality Board and the Science Advisory Board, and now reports to the Commission.

43. A joint Canadian-U.S. group of research managers recently reported on the Great Lakes research community's contributions, research priorities, and future challenges. See COUNCIL OF GREAT LAKES RESEARCH MANAGERS, FUTURES WORKSHOP (1989) [hereinafter FUTURES WORKSHOP]. For an in-depth treatment of the role of science in the formation and transformation of international regimes or governance structures, see INTERNATIONAL RESOURCE MANAGEMENT, *supra* note 17.

44. The first session of CUSIS, involving faculty members of twenty Canadian and U.S. colleges and universities, was held from December 1971 to June 1972 and focused on strengthening institutional arrangements for international resource management in the Great Lakes. See MANAGEMENT IMPROVEMENT STRATEGIES, *supra* note 33, at 7. See also Leonard B. Dworsky, *The Great Lakes: 1955-1985, in*



The Agreement's remedial strategies grew principally out of the recommendations of the two reference groups instituted in 1964 to study the lower Great Lakes and the St. Lawrence River areas, where the pollution was most conspicuous. To expand on the previously completed studies, the GLWQA called for two major follow-up studies: one on the upper lakes and the other on the diffuse sources known as non-point source pollution. Further, two IJC study groups were formed: the Upper Lakes Reference Group and the Pollution from Land-Use Activities Reference Group (PLUARG). The Upper Lakes Reference Group played a key role in the evolution of public participation in IJC reference studies.<sup>45</sup> This group contracted with Great Lakes Tomorrow to hold a series of public workshops explaining the issues and soliciting opinions. This experience provided the basis for future citizen-involvement in IJC activities.<sup>46</sup>

The advances the Upper Lakes Reference Group made in public participation were taken to new levels in the massive ecological study known as the Pollution from Land-Use Activities Reference (PLUARG). This five-year study of pollution from agriculture, forestry, and other land uses included over one hundred investigators. This was the first IJC reference dealing with the entire Great Lakes basin and involving public consultation panels from throughout the basin.<sup>47</sup> It proved to be very important not only in expanding scientific understanding of multiple sources of pollution, but also in laying the groundwork for an ecosystemic approach and expanding public participation in IJC activities.

Although there was little precedent for involving non-government-appointed experts in IJC investigations, the logic of public participation in PLUARG was relatively simple. The reference group was being asked to study an impossibly large subject across a vast geographic area—the set of activities within the Great Lakes drainage basin, including

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PERSPECTIVES ON ECOSYSTEM MANAGEMENT FOR THE GREAT LAKES: A READER 59 (Lynton K. Caldwell ed., 1988) [hereinafter PERSPECTIVES].

45. It is useful to note that the Boundary Waters Treaty contained a mandate for public hearings in conjunction with applications for approval for engineering works. Boundary Waters Treaty, *supra* note 9, art. XII, 36 Stat. at 2453-54. The IJC had also traditionally held hearings prior to the issuance of their recommendations to the governments. These were part of a formal process and the public tended to be intimidated, particularly in light of the increasingly technical nature of the reports. Interview with Mimi Becker, past President, Great Lakes Tomorrow, in Ann Arbor, Mich. (Oct. 17, 1991) [hereinafter Becker Interview].

46. Becker Interview, *supra* note 45.

47. Robert J. Mason, *Public Concerns and PLUARG: Selected Findings and Discussion*, 6 J. GREAT LAKES RES. 210-22 (1980).

agriculture, suburban development, and highway construction. Such activity either added polluting substances to the ground, ultimately to reach the lakes, or increased erosion and subsequently the run-off of silt and soil into the lakes. If such activities were to be controlled, they would ultimately be controlled at the local, and even the individual, level. In order for PLUARG to derive recommendations based on the actual pattern of life activities in the Great Lakes basin, and in order for those recommendations to have any chance of successful implementation, the cooperation and support of large numbers of politically influential individuals would be required. Public participation in PLUARG was premised on a general trend toward democratization of the decision-making processes usually left to experts,<sup>48</sup> on the opinion of those same experts that the public had valuable insights and self-acquired information to share. In addition, the public would need to be mobilized before PLUARG could achieve its ends. The stated objectives of the PLUARG consultation panels were to gain public support for the final PLUARG report to the IJC and to lend credibility to both PLUARG and the IJC.<sup>49</sup>

The reference group organized seventeen citizen panels around the basin, nine in the U.S. and eight in Canada, totalling several hundred citizens.<sup>50</sup> The consultation process was unique, characterized by its geographic extent, binational involvement, and use of citizen panels.<sup>51</sup> Citizens advised PLUARG on all aspects of the study. Their involvement not only had a direct impact on the final report but also positively influenced people's attitudes toward the GLWQA. It was successful in gaining both support and credibility, as was hoped.<sup>52</sup> A state-federal water resource planning agency reported that "public involvement in PLUARG had been a useful and successful aspect of the study, indicating that public involvement should continue to be a part

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48. A.P. Grima & Robert J. Mason, *Apples and Oranges: Toward a Critique of Public Participation in Great Lakes Decisions*, CAN. WATER RESOURCES J., Jan. 1983, at 22 [hereinafter *Apples & Oranges*].

49. *Id.* at 40.

50. Grima and Mason observe that a "very limited" public was involved in the PLUARG consultation panels, and the "general public remained generally unaware of the PLUARG study." *Id.* However, they further note that "the panels were representative of most potentially affected interests." *Id.*

51. Mason, *supra* note 47, at 210.

52. See *Apples & Oranges*, *supra* note 48; Carol Y. Swineheart, *A Review of Public Participation in the Great Lakes Water Quality Agreement*, in GREAT LAKES: LIVING WITH NORTH AMERICA'S INLAND WATERS (David H. Hickox ed., 1988).

of future management strategy."<sup>53</sup> Although PLUARG panel-reports and the final report to the IJC recommended expanded public education and participation, no provisions were made by the IJC or the Parties for the continued involvement of consultation panel representatives in implementation of PLUARG's recommendations.<sup>54</sup> Despite this, Mimi Becker, who ran public workshops to train interested citizens for participation in IJC hearings, maintains that along with the work on the Upper Lakes Reference Group, the PLUARG efforts "set the precedent for opening up the IJC annual meetings so that citizens could have more than just the privilege of asking questions during the press conference, and provided the basis for the IJC to deal more substantively with informed members of the public."<sup>55</sup>

In addition to opening up the process to the public in unprecedented ways, the research accomplished under these new investigative initiatives furthered the ecological understanding of the Great Lakes and provided a scientific base of information which served as the impetus for the 1978 GLWQA. Studies confirmed the impacts of cross-media pollution such as acid rain and non-point source pollution from agricultural lands and groundwater sources, thus substantiating the need to consider more than just water quality in efforts to curb pollution.<sup>56</sup>

The 1972 GLWQA was in force for five years before it was revisited by the Parties. In the years between 1972 and 1978, progress was made in reducing phosphorus inputs through sewage treatment and the gradual elimination of phosphorus from laundry detergents. The eutrophication problem was on its way to being resolved. With this success, the problem of toxic industrial chemicals and pesticides present in the flesh of fish and other animals—previously masked by the more visible problems of eutrophication—once again emerged as the focus of concern in the Great Lakes.<sup>57</sup>

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53. GREAT LAKES COMMUNICATOR (U.S. Great Lakes Basin Commission, Ann Arbor, Mich.), Oct. 1978, at 7.

54. See Swineheart, *supra* note 52, at 121.

55. Becker Interview, *supra* note 45.

56. "PLUARG's more than 100 reports [during its six year study] were crucial in putting the ecosystem approach at the core of the 1978 [Great Lakes Water Quality] [A]greement." THEODORA E. COLBORN ET AL., GREAT LAKES, GREAT LEGACY? 195 (1990). Caldwell also notes the significance of PLUARG in incorporating the ecosystem approach in the 1978 GLWQA. See R.L. Thomas et al., *The Ecosystem Approach: A Strategy for the Management of Renewable Resources in the Great Lakes Basin*, in PERSPECTIVES, *supra* note 44, at 31-57.

57. See generally COLBORN, *supra* note 56; ASHWORTH, *supra* note 7; WELLER, *supra* note 29.

As early as 1963, studies of herring gull eggs in Lake Michigan concluded that thinning shells and poor reproductive success were probably associated with concentrations of dichlorodiphenyltrichloroethane (DDT) and its toxic metabolite, dichlorodiphenyl dichloroethylene (DDE), which birds assimilated from their diets of Lake Michigan fish. In 1968, mercury from the chlor-alkali wastes, dumped into the lakes and their tributaries, was measured in the sediment and fish of Lake Ontario. In 1971, common terns with deformed cross-bills were discovered in Hamilton Harbor in Ontario, an apparent result of the chemical stew of polychlorinated biphenyls, DDT, and hexachlorobenzene found in their eggs. Mirex, an organic chemical fire retardant and pesticide, was discovered in fish in the early 1970s.<sup>58</sup> By the mid-1970s, states and provinces were routinely issuing warnings about eating the fish from the lakes, and several commercial fisheries were closed.<sup>59</sup> The chemicals of primary concern are synthetic organic chemicals produced directly by, or as byproducts of, industrial processes. Sources range from industrial and municipal outfalls, contaminated air and rain, leaking landfills, previously contaminated sediment resuspended by currents, dredging and storms, agricultural practices, and the widespread household use of solvents and pesticides. Together, these chemicals represent a source of biochemical stress new to the industrial era which Great Lakes creatures have never previously encountered and for which few, if any, species have evolved coping mechanisms. The most serious threat comes from chemicals which do not break down through metabolic action and those which are insoluble in water and concentrate in fat. This resulting environmental persistence means these chemicals circulate and recirculate unchanged through the ecosystem's physical and biological pathways, gradually becoming ubiquitous throughout the system. Because these chemicals are stored in fatty tissues, and have a tendency to accumulate, the concentration levels increase as the chemicals make their way up the food chain. For example, PCBs are bioaccumulated 25-million-fold in Great Lakes food webs, from water to bald eagles' eggs. Hence, minute

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58. WELLER, *supra* note 29, at 113.

59. For more detailed accounts of scientific findings regarding the effect of toxics on Great Lakes biota, see Michael Gilbertson, *Epidemics in Birds and Mammals Caused by Chemicals in the Great Lakes*, in TOXIC CONTAMINANTS AND ECOSYSTEM HEALTH: A GREAT LAKES FOCUS (M. Evans ed., 1988). See also COLBORN, *supra* note 56, at 113-85 (examining the ecological and human health impacts of toxics in the Great Lakes).

amounts of certain chemicals can become large problems throughout the whole system.<sup>60</sup>

The toxics problem was significantly more complicated than the primary nutrient pollution problem addressed by the 1972 GLWQA which could be traced with comparative ease to municipal sewage systems and phosphorus in detergents. Two solutions to nutrient pollution, installation of sewage treatment plants and prohibition of phosphorus detergents, although expensive, were manageable with the participation and coordination of existing state and provincial governments. By contrast, the problem of toxic contamination emphasized in the 1978 GLWQA could not be solved by a single jurisdiction or without substantial changes in industry and consumer practices. The 1987 Protocol needed to break new ground in international cooperation and institutional arrangements.

The lesson taught by the presence of toxics in the Great Lakes was that society ignores the interrelationships of the natural system at its own peril. By the time levels of pollution reach the point where damage is apparent, governments face dwindling choices for correcting the problem. Clean-up costs are exorbitant and restoration may be impossible. The only pollution policy that makes sense is prevention, i.e., understanding how stresses are likely to alter the ecosystem and eliminating those stresses that are preventable while minimizing those that are not. From such realizations came the case for a policy based on ecosystem science and a subsequent commitment by Canada and the U.S. in the GLWQA to an ecosystem-based approach to restore the integrity of the Great Lakes.

Indeed, the 1978 GLWQA's<sup>61</sup> purview was greatly expanded. After recognizing that the problems of toxics in the Great Lakes could not be resolved by actions focused on the lakes alone, the 1978 Agreement extended the scope of the 1972 GLWQA to the entire Great Lakes ecosystem, including the land surrounding the lakes and the inflowing streams.<sup>62</sup> In addition to extending the physical boundaries covered by the treaty, the concept of water quality was expanded, and the interdependence of all components of the ecosystem, including humans, was

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60. For an overview of bioaccumulation of toxics and related impacts on Great Lakes species, see R.J. ALLAN ET AL., ENVIRONMENT CANADA, TOXIC CHEMICALS IN THE GREAT LAKES AND ASSOCIATED EFFECTS (1991).

61. 1978 GLWQA, *supra* note 1.

62. *Id.* arts. I(g),(h), 30 U.S.T at 1385.

acknowledged.<sup>63</sup> The 1978 GLWQA defined the Great Lakes ecosystem as "the interacting components of air, land, water and living organisms, including humans, within the drainage basin of the St. Lawrence River."<sup>64</sup>

The 1978 Agreement also expressed several additional concerns in response to the findings of PLUARG regarding non-point source pollution and the effects of air pollution on water quality. The U.S. and Canadian governments agreed that "[t]he discharge of toxic substances in toxic amounts be prohibited and the discharge of any or all persistent toxic substances be virtually eliminated,"<sup>65</sup> and "to eliminate or reduce to the maximum extent practicable the discharge of pollutants into the Great Lakes System."<sup>66</sup>

The foregoing two aspects of the GLWQA—the ecosystem approach to environmental protection and zero discharge of persistent toxics—derived from the growing awareness of ecology and the nature of the toxics problems.<sup>67</sup> The adoption of these concepts within a binational agreement is of major international importance. The challenge facing the governments in the region is how to translate an ecosystem approach and zero discharge into action feasible within the constraints presented by each nation's federal structures and political cultures.<sup>68</sup>

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63. The 1978 GLWQA includes Lake Michigan, which was not previously considered part of the "boundary waters" because it was geographically situated wholly within U.S. jurisdiction. Its inclusion in the 1978 GLWQA is one example of the increasing predominance of an ecosystem perspective and consideration of ecological factors. See *id.* Commenting on further shifts in this direction, the Council of Great Lakes Research Managers summarized the two-decade transition in the context of the Great Lakes Water Quality Agreements: "The transition of the Agreement from an Agreement on water quality (in 1972) to an Agreement on water quality in an ecosystem context (1978), to an Agreement on managing the human uses and abuses of the Great Lakes Basin Ecosystem, is not completed, but the 1987 [P]rotocol represents significant movement in this direction." FUTURES WORKSHOP, *supra* note 43, at 121.

64. 1978 GLWQA, *supra* note 1, art. I(g), 30 U.S.T. at 1385.

65. *Id.* art. II(a), 30 U.S.T. at 1387.

66. *Id.* art. II, 30 U.S.T. at 1387.

67. For a treatment of these concepts from an advocacy perspective, see NATIONAL WILDLIFE FEDERATION AND THE CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY, A PRESCRIPTION FOR HEALTHY GREAT LAKES: A REPORT OF THE PROGRAM FOR ZERO DISCHARGE (1991).

68. The problems and contradictions inherent in translating "an ecosystem approach" into meaningful action have been fairly well explored though not yet resolved. See PERSPECTIVES, *supra* note 45; see also Don Munton, *Toward a More Accountable Process: The Royal Society-National Research Council*, in PERSPECTIVES, *supra* note 45, at 299 (examining the limitations of institutional arrangements); W.J.

As the International Joint Commission wrote:

Existing resource management approaches which partition the environment into separate components of land, water and air with associated biota are recognized as inadequate since management of a resource component in isolation from adjacent or interacting components would likely produce short-sighted strategies to protect one component of the environment at the expense of another. Because existing environmental and resource programs are separated, compartmentalized and spread throughout various bureaus, agencies, ministries and departments, the new approach requiring a holistic overview entails, at the very least, a reorganization of thinking, and perhaps a reorganization of institutional arrangements.<sup>69</sup>

It may be that fundamental institutional change is necessary before an ecosystem approach to environmental protection can become a reality, however, institutional arrangements seldom reorganize without pressure from outside forces. The participation of environmental NGOs in the decision-making process (insofar as it encourages governments to be accountable for their ecosystem commitments) and the introduction of new and creative ideas into the institutional dialogue may be instrumental in closing the gap between ecosystem rhetoric and action. Of all the problems, the ubiquitous presence of industrial chemicals and pesticides that taint the lakes and compromise the health of its living creatures has most taxed the creativity and resources of government environmental agencies. The seeming intractability of the toxics problem has brought into question the effectiveness of accepted regulatory policy and structures. As a result, the opportunity to challenge government's willingness and its ability to protect the environment has been created. Several non-governmental organizations have stepped forward, presenting alternative approaches to environmental protection. They have pushed their agendas at the local, state and provincial, national and international levels. Claiming a stake in the entire ecosystem regardless of borders, they have acquired legitimacy as defenders of environmental interests. These NGOs have gained leverage with the Parties and other actors by communicating and

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Christie et al., *Managing the Great Lakes as a Home*, 12 J. GREAT LAKES RES. 2 (1986). Cf. Barry B. Boyer, *Ecosystem, Legal System, and The Great Lakes Water Quality Agreement*, 41 BUFF. L. REV. (forthcoming Summer 1993) (offering a more legalistic analysis); Jack Manno, *Federalist and Ecologist* (1991) (unpublished manuscript, on file with author).

69. IJC SECOND BIENNIAL REPORT, *supra* note 11, at 13.

strategizing across national boundaries, and by using the Great Lakes Water Quality Agreement, especially its espousal of the ecosystem approach and zero discharge, as their own. As the National Wildlife Federation's Tim Eder has said, "[I]t's always important to have goals against which to measure governments' progress, all the better if it's something the governments themselves have put out there."<sup>70</sup> The environmental NGOs in the Great Lakes region have often played this role *vis-a-vis* the GLWQA, pushing the institutions to find ways of implementing the various programs outlined in the Agreement.<sup>71</sup>

The three NGOs invited as observers to the 1987 Protocol negotiations—the Sierra Club, the National Wildlife Federation (NWF), and Great Lakes United (GLU)—had each pressured governments in their own ways to implement the GLWQA. The Sierra Club, although originally a California association focused on the Sierra Nevada Mountains, has grown into a nationwide organization since the end of World War II, with a current membership of nearly half a million. The Sierra Club's expanded purpose, according to its public literature, is:

[T]o explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.<sup>72</sup>

In 1986, the Club increased its level of political activity in the Great Lakes by initiating the Great Lakes Federal Policy Project with funding from the George Gund and Joyce Foundations. Along with Great Lakes United, the Project coordinates an annual Great Lakes Washington Week which brings activists to Washington to meet with congressional representatives and EPA officials. The activists gain hands-on experience with federal environmental policy making, and raise Great Lakes

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70. Interview with Tim Eder, Staff Member, *National Wildlife Federation*, in Traverse City, Mich. (Sept. 28, 1991); Telephone Interview (Mar. 28, 1991).

71. Oran R. Young has observed that "[i]nternational regimes . . . commonly give rise to nongovernmental interest groups committed to defending the provisions of specific regimes and prepared to press governments to comply with their dictates. In fact, the establishment of a regime can stimulate the growth of powerful interest groups in a number of the member states, which then form transnational alliances in order to persuade responsible agencies to comply with the requirements of the regime." *Id.* YOUNG, *supra* note 3, at 78. Young cites the Mediterranean Action Plan and the 1972 and 1978 Great Lakes Water Quality Agreements as examples.

72. The Sierra Club (informational brochure, on file with author).



issues at meetings and hearings. The Project also publishes a monthly report, the goal of which is to "provide timely information on federal actions affecting environmental quality of the Great Lakes, . . . [and to] report on the activities of Congress, key agencies and other negotiations, covering issues from pollution control to appropriations."<sup>73</sup>

The Great Lakes Federal Policy Project has offices in Washington, but is closely coordinated with the Sierra Club's Midwest Regional office and is led by the region's director, Jane Elder. Elder, along with GLU's Tim Eder, and the National Wildlife Federation's Mark Van Putten, formed the NGO observer group on the U.S. delegation to the 1987 Protocol negotiations.

The National Wildlife Federation was founded in 1936 "to educate the public about conservation as well as the symptoms of and the solutions to environmental abuse and neglect."<sup>74</sup> The Great Lakes Regional Office (GLRO) in Ann Arbor, Michigan, has focused on the effects of toxic chemicals on fish and wildlife. The GLRO has also focused on political and legal pressure to reduce the input of toxics to the lakes.

Great Lakes United, a transnational coalition of organizations, including Sierra Club locals and National Wildlife Federation affiliates, was the NGO most involved in monitoring the GLWQA. Therefore, the evolution of GLU's organizational structure, positions, and strategies, warrants examination. GLU's history and its participation in the review process for the 1987 Protocol is highlighted because, "as a coalition of sportsmen, environmental, conservation, labor, business, community organizations, and individuals from eight Great Lakes states and two Canadian provinces,"<sup>75</sup> it represents a diversity of interests in both nations. Member organizations have their own contradictory interests but agreed to suspend those conflicts to cooperate for the benefit of the ecosystem. GLU encourages personal identification as "citizens" of a watershed. Identification with ecozones, or bioregions, challenges presumptions of the predominant importance of national interests, presumptions which are, as shall be seen, already undermined by the nature of the environmental issues under discussion. As noted above, Great Lakes United includes groups with a broad spectrum of interests. It has had to carefully nurture the shared assumption of mutual interests in the coalition, while speaking with a clear and consistent voice on behalf of environmental protection.

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73. GREAT LAKES WASH. REP. (The Sierra Club), Mar. 1987, at 1.

74. National Wildlife Federation (informational brochure, on file with author).

75. Great Lakes United (informational brochure, on file with author).

As a binational organization, GLU has credibility when dealing with binational issues, and thus has played a greater role in the Canadian-U.S. dialogue than advocacy groups operating in either nation exclusively. Several commentators and scholars have remarked on GLU's effectiveness.<sup>76</sup> As will be seen, GLU was particularly effective in developing and implementing a strategy for influencing the way the governments carried out their responsibility for reviewing the GLWQA in 1987.

### III. GREAT LAKES UNITED: BUILDING PUBLIC CONSENSUS AND POLITICAL WILL FOR IMPLEMENTATION OF THE GREAT LAKES WATER QUALITY AGREEMENTS

#### A. Background

1. *Institutions.* Not surprisingly, the issues which have engaged concerned citizens in the Great Lakes region have changed along with the chemical, ecological, and social transformations described above. Early in the century, public health reformers in cities across the region led the push for drinking water treatment and sanitation.<sup>77</sup> The preservationist movement that gave rise to the Sierra Club and other groups in the United States<sup>78</sup> had an impact on the Great Lakes region, most notably in the effort to protect the Indiana Dunes from industrial developments concentrating on the southern shore of Lake Michigan.<sup>79</sup>

The environmental movement in Canada has evolved from slightly different origins and influences, although sharing similar goals of preservation and conservation. In the 1960s, small environmental organizations arose throughout the region. Most of these focused on specific evidence of pollution problems in their immediate area: examples include fouled beaches in Erie, Pennsylvania, concerns about drinking water safety in Toronto, alewife die-offs in Lake Michigan, the

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76. Weller has quoted Governor James Blanchard as describing GLU as "informed, effective and influential." WELLER, *supra* note 29, at 121. The Institute for Research and Public Policy and the Conservation Foundation together noted GLU's prominent role in binational cooperation. COLBORN, *supra* note 56, at 217. See also SALLY LERNER, A STUDY OF ONTARIO VOLUNTEER ENVIRONMENTAL STEWARDSHIP GROUPS (Heritage Resources Centre Technical Paper No. 6, 1991).

77. See generally NELSON MANFRED BLAKE, WATER FOR THE CITIES: A HISTORY OF THE URBAN WATER SUPPLY PROBLEM IN THE UNITED STATES 248-64 (1956).

78. See generally ECOLOGY VERSUS POLITICS IN CANADA (William Leiss ed., 1979).

79. See J. RONALD ENGEL, SACRED DUNES: THE STRUGGLE FOR COMMUNITY IN THE INDIANA DUNES 271 (1983).

decline of lake trout fishing in Irondequoit Bay, and efforts to protect St. Lawrence riverbanks and islands from the effects of Seaway activities.<sup>80</sup>

In many of these situations the public concern over the visible effects of pollution on their environment outpaced their knowledge of the causes. Governments were unable to respond to citizens' concerns with definitive answers.<sup>81</sup> This gap stirred many to turn to the new environmental organizations which placed blame squarely upon industry practices and government neglect. Heightened awareness of the environmental problems in the late 1970s, as well as growing environmental activism, resulted in a proliferation of new organizations in the Great Lakes basin and throughout the U.S. and Canada.<sup>82</sup>

Concerns, particularly in the Lake Ontario region, reached new heights with the dramatic news surrounding the Love Canal contamination crisis. Organizations like Pollution Probe in Toronto pointed out that the same chemicals driving Love Canal residents from their homes were leaking from scores of waste sites along the Niagara River, only 50 kilometers from Toronto's drinking water intake pipes directly across the western basin.<sup>83</sup>

Not only were environmental organizations in both Canada and the U.S. becoming increasingly involved in Great Lakes issues, they were also occasionally collaborating with each other across the border. Pollution Probe and Operation Clean Niagara, from Niagara-on-the-Lake, Ontario, received *amicus curiae* standing in lawsuits involving the dioxin-contaminated Hyde Park landfill in New York where leachate was trickling down the walls of the Niagara gorge into the river.<sup>84</sup> Pollution Probe also worked closely with a local coalition that had been heavily involved in Love Canal issues, the Ecumenical Task Force of the Niagara Frontier.

The exchanges between Canadian and American activists provided lessons for both, as they each saw aspects in the other's legal institu-

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80. See WELLER, *supra* note 29, at 130.

81. Steven Schatzow, *The Influence of the Public on Federal Environmental Decision-Making in Canada*, in PUBLIC PARTICIPATION IN PLANNING 141, 148-49 (W.R. Sewell & J.T. Coppock eds., 1977).

82. For an informative overview of the origins and development of North American environmental movements, particularly with regard to the issue of toxic pollution, see ROBERT C. PAEHLKE, ENVIRONMENTALISM AND THE FUTURE OF PROGRESSIVE POLITICS 13-40 (1989).

83. See WELLER, *supra* note 29, at 145-48.

84. See *United States v. Hooker Chemical & Plastics Corp.*, 540 F.Supp. 1067 (W.D.N.Y.), *aff'd*, 749 F.2d 968 (2d Cir. 1984). See also WELLER, *supra* note 29, at 146-47.

tions and administrative cultures<sup>85</sup> that they coveted. Canadian public servants, in general, had more discretionary authority to take action. As a result, when Canadian environmentalists participated in public consultation procedures, they were more confident that they were speaking with individuals who could make decisions. A tradition of public consultation has existed in Canada and agencies often provide travel and other support to private groups to facilitate participation. As a result of this very independence, however, Canadian administrative decisions are less open to legal challenges in the courts, and Canadian activists, therefore, often look longingly across the border to a public armed with what looks (from the Canadian perspective) more like real power in the form of access to environmental litigation.<sup>86</sup>

Along with these different traditions of public participation, Canadian and American groups also differ in their level of political independence as a result of different tax laws. The Canadian tax system makes it much more difficult for organizations with any political content to obtain tax exempt status.<sup>87</sup> As a result, Canadian groups have less access to private and foundation funding and often rely on the government for the bulk of their income. To Americans, this government support has often appeared to represent a more generous form of democracy in that Canadians are, in some respects, being paid to challenge their governments.

2. *Issues.* Two issues surfaced in the late 1970s which fostered a sense of shared interest among environmentalists, government officials, and many businesses around the basin in both countries: proposals to divert Great Lakes water to the drought-stricken Midwest region of the continent, and reconsideration of winter navigation on the Great Lakes-St. Lawrence Seaway. In addition, many of the traditional sportsman and conservationist organizations began paying increased attention to threats to fish and game and their habitats from pollution and encroachment by human activities.<sup>88</sup>

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85. See, e.g., Errol Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 LAW & POLY 355 (1987) (discussing the concept of regulatory culture).

86. This issue is briefly addressed in Jack Manno, *Moderator Introduction*, in ENVIRONMENTAL DISPUTE RESOLUTION IN THE GREAT LAKES REGION: A CRITICAL APPRAISAL 65 (Lynne S. Bankert & R. Warren Flint eds., 1988). See also ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 19-20 (1983).

87. See generally MINISTRY OF REVENUE TAXATION, GOVERNMENT OF CANADA, INFORMATION CIRCULAR NO. 80-10R, REGISTERED CHARITIES: OPERATING A REGISTERED CHARITY (1985).

88. See generally COLBORN, *supra* note 56.

The revival of the shipping industries and the Army Corps of Engineers' interest in keeping the St. Lawrence Seaway open throughout the winter months evoked considerable public protest. Normally, the Seaway opens in early April and remains open until early December. During the winter months, the Seaway's customers switch to rail, trucks, and storage. Winter navigation would increase both the Seaway's revenue season and its convenience and attractiveness to customers. Thus, since the opening of the Seaway in the 1950s, proposals have been regularly put forth to extend the season through the use of ice breakers and underwater dams to keep locks and channels open.<sup>89</sup> Just as regularly, environmentalists and riverside residents have raised concerns about such problems as accidental oil and chemical spills dispersing beneath the ice and into bottom sediment, fish spawning areas being scoured by ice churned under by passing boats, shoreline being eroded by tanker wakes and broken ice, and disruption of a variety of sensitive winter fish and wildlife habitats.

Despite the simple surface logic of winter navigation proposals, the cost-benefit considerations were ludicrously out of balance. A variety of woes had befallen the Great Lakes shipping industry, making it inconceivable for the economic benefits from increased shipping and toll receipts to ever outweigh the engineering maintenance costs required for winter navigation. The proposed schemes reeked of pork barrel politics and had little overt political support, even from the leaders of portside communities.<sup>90</sup> They represented, therefore, no entrenched powerful economic forces at work, no workers to be displaced, and were, as a result, good organizing targets.

The other perceived threat involved proposals to divert Great Lakes water beyond basin boundaries to dry regions of the continent. A variety of engineering schemes have been proposed at one time or another using Great Lakes water for the purposes of irrigating midwestern agriculture, moving western coal via a coal-slurry pipeline, and most recently, to raise the Mississippi made shallow by drought.<sup>91</sup> Threat of large-scale diversion was a primary concern in Canadian and U.S. negotiations leading to the Boundary Waters Treaty in 1909,<sup>92</sup> and has had the effect of highlighting the mutual economic interests of both countries. Great Lakes officials began to see their abundant supply of

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89. *Id.*

90. Interview with Daniel Green, Director, Societe pour le Vaincre de la Pollution, in Ottawa Ont. (May 4, 1991).

91. See Michael J. Donahue et al., *Great Lakes Diversion and Consumptive Use: The Issue in Perspective*, 18 J. INT'L L. 19, 19-48 (1986).

92. Boundary Waters Treaty, *supra* note 9.

water as a competitive advantage against the so-called Sunbelt—what some editorial columnists in the Great Lakes region had come to call the "Parchbelt"<sup>93</sup>—and any talk of tapping into the Great Lakes water supply were "fighting words."

The economies of the western United States and Canada have been stimulated by oil and mineral production, irrigation, agriculture, and tourism. At the same time, the Great Lakes economy has suffered a steady decline in its heavy manufacturing-based industries. If the availability of fresh water was to become a limiting factor for recently expanding economies of the Sunbelt, then the Great Lakes, the world's largest supply of surface liquid fresh water, could one day be the source of more wealth than all the oil in Texas. With such visions in mind, the states bordering the lakes eventually formed a Great Lakes Charter, agreeing to consult with each other before any significant diversions would be allowed.<sup>94</sup>

Proposals for winter navigation and out-of-basin diversions created a sense of shared regional interest, and made fairly easy targets for activists. Both issues involved future threats with potential costs throughout the entire Great Lakes system which still could be averted by proactive cooperation. Both had larger than life "bad guys"—sunbelt speculators and the Corps of Engineers—neither of which had the ability or intention to act immediately on their proposal. There was nothing inevitable about the proposals. The various engineering schemes promised future, but highly speculative, profits. Wayne Schmidt, a staff ecologist with Michigan United Conservation Clubs (MUCC), recognized the difference between these natural coalition-building issues and other more difficult concerns such as water quality: "Winter navigation was a natural issue which brought all the entities together. But things aren't always so clear cut. It's difficult to get people in Quebec and Wisconsin to get together on water quality issues."<sup>95</sup> The ineffectiveness of some of these difficult problems in garnering public support led to disputes within environmental organizations. The disputes largely focused upon a balance between choosing issues most important from an environmental perspective, and choosing those most suitable for building broad coalitions.

For example, many environmental groups involved with the Great Lakes during this nascent period, including the Lake Michigan

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93. See, e.g., D. Gunner Carlson, *Lakes Need a United Front*, THE SAGINAW NEWS, Dec. 3, 1982, at B2.

94. See generally WELLER, *supra* note 29.

95. *Great Lakes Coalition Proposed by Group*, WATERTOWN DAILY TIMES, Dec. 1, 1981, at 1.

Federation, Sierra Club, and Operation Clean Niagara, had the toxics issue clearly on their agenda. From the perspective of organizing regional cooperation among environmental advocacy groups, however, winter navigation and diversion had several advantages over the more complex problems of toxic contamination. Issues of diversion and winter navigation, unlike issues of toxics, were variations on century-old debates regarding management of public resources.<sup>96</sup> Positions of the actors could be defined and variously interpreted according to the terms of those experiences. Toxics, on the other hand, involved physical and political factors which complicated advocacy groups' organizing strategies. These complications were driven in part by the fact that toxic substances get into the ecosystem as the by-products and waste of essentially every current major economic activity. The "bad guys" are not distant schemers or government bullies, but are all around us. Because toxic contamination is so ubiquitous and its sources so diffuse, measuring its impact is complicated by the absence of an uncontaminated "control" population or a "quiet" background against which to measure the toxic noise. It is extremely difficult to locate specific effects on human populations that can be directly attributable to specific toxicants.

Quantities of toxics, although immense in the aggregate, are highly diffuse and diluted in immense volumes of water. The costs of cleaning up any single source are usually far greater than the benefits to be derived from any individual clean-up when that clean-up's benefits are measured as proportionate to the overall problem. Because clean-up is so costly and inefficient, it is better to prevent pollution in the first place. But pollution prevention requires process changes and life-style adaptations that go to the heart of personal choices and economic realities. As a result, pollution prevention may not be the best ground on which to organize advocates across socio-economic, racial, and cultural lines.

Finally, organizing around toxics issues is complicated by the threat posed to the hunting, fishing, and tourism industries by widespread public fear of toxic contamination. These industries form the economic underpinning of sportsmen's clubs such as MUCC. Thus, although governments' difficulties in addressing the issues of toxic contamination opened the door for environmental advocacy, the complexities of the issue also threatened to undermine the capacity of environmental NGOs to attract broad constituencies.

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96. There are several good analyses of the positions and concerns that characterize the earlier conservation movement. See, e.g., SAMUEL HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959).

These problems plagued those who tried to organize around toxic pollution. Despite these complications, however, improved understanding of toxics led to growing acceptance by the scientific community, governments, and advocacy groups of the necessity of an ecosystem approach in stopping pollution. A major strategic shift resulted from the realization that many of the localized problems had a common thread: the degradation of the Great Lakes ecosystem as a whole. This shift reflected a recognition that the individual components of the Great Lakes ecosystem function together and that actions in one part may result in unpredictable ramifications in another. This recognition occurred in different ways for different organizations and regions, but developed parallel to the articulation by the IJC and the Canadian and U.S. water quality agencies of the need to take an ecosystem approach to handling Great Lakes pollution.

In order to assert political power at the ecosystem level, the focus of environmental advocacy needed to be at the level where decisions affecting the entire ecosystem could be made. There was a growing sense among scientists and policy experts, the "epistemic community" of the Great Lakes, that the existing institutional structures were incapable of resolving the crises facing the ecosystem.<sup>97</sup> Academic and scientific meetings took on an increasingly political tone. It was in this context that many Great Lakes environmental interest groups saw the need to form an alliance despite their differences. The efforts to create such an alliance constitute the early history of Great Lakes United and demonstrate many of the forces that hold environmental coalitions together and some of those that tend to break them apart.

### *B. Coalition Building*

Tom Washington, the Executive Director of Michigan United Conservation Clubs (MUCC), a state-wide coalition of sportsmen's and conservation clubs with nearly 200,000 members, was among those who believed that some kind of regional Great Lakes federation was needed. In 1981, Washington and staff ecologist Wayne Schmidt foresaw a Great Lakes organization based on the MUCC and National Wildlife Federation models of a coalition of like-minded organizations with a strong central administration to address shared concerns across the basin.

In MUCC's first press release on the matter, issued in November 1981, Washington said he planned to establish a federation to protect

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97. See Lynton Caldwell, *Implementing an Ecological Systems Approach to Basinwide Management*; Leonard B. Dworsky, *The Great Lakes: 1955-1985*, in *PERSPECTIVES*, *supra* note 45.



and improve Great Lakes water quality. "This federation could be instrumental in the long-term protection and improvement of Great Lakes water quality through citizen action. It could be a valuable tool in educating citizens and organizations in the Great Lakes basin about the inter-relationship of the waters of the basin and the need for an 'ecosystem approach' to managing water and other natural resources of the Great Lakes."<sup>98</sup>

With a grant from the Joyce Foundation, the MUCC staff began the process of bringing Great Lakes organizations together. However, as the perception of common threats and mutual interests brought people together, fears that their individual interests, styles, and philosophies would be subsumed by a dominant central authority drove them apart. Mixed with political disagreements and differences in organizational styles was the involvement of several controversial and flamboyant individuals.

### *C. Leadership and Organizational Structure*

Differences in political styles and goals nearly aborted early efforts to form a Great Lakes coalition organization. In the summer of 1982, MUCC and the Joyce Foundation issued invitations to the leaders of Great Lakes organizations to meet at Mackinac Island near the straights dividing Lakes Huron and Michigan. Fifty-five delegates, from eight states and two provinces, attended. The debate quickly centered on what kind of organization should be created. Probably the most critical dilemma facing the new coalition was the contradiction between the decentralized nature of a diverse coalition and the need for strong leadership to hold the group together while representing its many interests. Tom Washington and others argued for the formation of a strong regional organization that could advocate positions with a single voice representing the scores of groups with environmental portfolios. Many others saw a need for a central information clearinghouse and networking node for existing groups, but feared a new organization would compete with them for influence, funding, and members. The issues of organizational structure were mirrored in leadership styles. Tom Washington and Wayne Schmidt worked in, and were used to, organizations with top-heavy, authoritarian decision-making styles, whereas many of the environmental organizations involved early in the Great Lakes coalition building promoted a more egalitarian, participatory style.

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98. *Lakes Topic of Meeting*, MINING JOURNAL, Nov. 21, 1981, at 7.

The Mackinac meeting ended inconclusively with the issuance of a consensus document. This document focused on the need for vigilance against the threats of diversions and pollution. Additionally, an agreement was reached to form an organization called Great Lakes United (GLU), the structure and purpose of which were to be hammered out at a second meeting six months later in Windsor, Ontario.

Organizational and personal issues came to a head at this November meeting in Windsor. One hundred and ten delegates representing seventy groups from all the Great Lakes states and provinces agreed to form a coalition. However, in coming to this agreement, they ousted from leadership roles Tom Washington and Barry Freed (also known as Abbie Hoffman), the most controversial figure in GLU's early history.<sup>99</sup> The decisions made regarding leadership and organizational structure, as well as the skills honed in securing them, helped establish GLU credibility and legitimacy in the basin.

1. *Leadership.* Representatives of the National Wildlife Federation, the Sierra Club, the Audubon Society, Toronto's Pollution Probe, the binational education group Great Lakes Tomorrow, the League of Women Voters, the Federation of Ontario Naturalists, Lake Michigan Federation, and others joined in Windsor to reject a strong executive director and an independent Board of Directors, favoring instead a decentralized, organizational model structured around "task forces."

The idea behind the task forces was that of issue sectors: each task force would be comprised of representatives from member organizations interested in a specific issue. The task forces would recommend political strategies to the coalition and sometimes carry out activities in the name of the coalition. The task force structure would prevent a centralized

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99. Abbie Hoffman had been a leading organizer of many of the highly publicized displays of 1960s radicalism and a key figure in the loose network of theatrical protesters known as the Yippies. He had an uncanny ability to broadcast his brilliantly succinct political symbols by capturing the attention of America's news-entertainment complex. Out of his ability to manipulate the national media, he crafted a unique political philosophy and strategy, which he preached enthusiastically. Convicted of, and later exonerated for, inciting to riot in his role as one of the leaders of anti-war demonstrations at the 1968 Democratic National Convention in Chicago, he went underground in 1972 to avoid cocaine trafficking charges which he insisted were part of a frame-up. See generally *THE BEST OF ABBIE HOFFMAN* (Daniel Simon & Abbie Hoffman eds., 1989). During his years in hiding he created, with plastic surgery and short hair, the persona of Barry Freed, a St. Lawrence resident and leader of the Save the River environmental organization. In 1980 he surrendered to U.S. authorities and was released from prison in the Spring of 1982. *Id.* at 343-57. As a representative of Save the River, he joined the meetings at Mackinac and Windsor.

authority from making decisions on behalf of the many local members. The Detroit Free Press quoted Mimi Becker, Great Lakes Tomorrow project manager, as saying, "We won't have action done by some executive director that goes running around from state to state. The political action and the credibility must be implemented by local groups."<sup>100</sup>

2. *Organizational Model.* There were concerns that organizations with large memberships, such as the 100,000-member MUCC, would crowd out smaller groups; that those organizations with hierarchical structures, such as the labor unions, would dictate solid block votes; and that groups such as Save the River, with media stars like Hoffman, would end up speaking for the group. There was also concern about gender equity and male-dominated leadership. Many of the groups opposed to the centralized structure were represented by competent, politically-astute women leaders: Glenda Daniel of the Lake Michigan Federation, Carol Swineheart of the League of Women Voters, Jane Elder of the Sierra Club, Pamela Chase of Pollution Probe, and Mimi Becker of Great Lakes Tomorrow. They were suspicious of the organizational leadership styles brought to GLU's founding by Washington and Hoffman. Furthermore, concerned Canadians feared that U.S. groups would dominate. The U.S. groups had initiated the coalition-building process, obtained the initial grant money, and were already larger and more powerful than their Canadian counterparts. These concerns were played out in the structuring of the by-laws. The debate over whether individuals or organizations should have membership and voting privileges was really about whether large organizations, like MUCC, could dominate. The debate over the role of an executive director was really a referendum on the personalities and styles of Washington and Hoffman.

Those favoring a strong executive argued that environmental problems often require quick responses and that some central authority needs to be empowered to act without the lengthy procedure of setting up a task force for each problem. Proponents of a decentralized structure, on the other hand, pointed to the Clean Air Coalition and the coalition of groups that had fought the Alaskan oil pipeline as examples of coalitions which still managed to respond quickly and were more successful than authoritarian groups in arousing grass-roots support. The decentralists won the day. By the end of the Windsor meeting, the founding members of the new organization, Washington and Wayne Schmidt, and their activist ally Abbie Hoffman, had been rebuffed.

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100. David Everett, *Great Lakes Coalition Born*, DETROIT FREE PRESS, Nov. 22, 1982, at A3 [hereinafter *Great Lakes Coalition Born*].

Washington and Hoffman threatened to pull their organizations out of the coalition. Washington was quoted in the *Bay City Times*: "I don't think we'll be really active participants in this organization. The amendments (passed at Windsor to reduce central authority) take away any strength or power to act in an expedient manner."<sup>101</sup> Abbie Hoffman, quoted in the *Detroit Free Press*, was, as usual, more to the point: "We are interested in political action. We're sick of groups that sell newsletters."<sup>102</sup>

In the six months between the November 1982 Windsor meeting and the first Annual Meeting of Great Lakes United in Detroit in May 1983, the mainstream conservation groups were able to agree to a set of by-laws and policy statements. They also agreed on a president, Bob Boice, a career employee of the New York State Department of Environmental Conservation and an officer in the New York State Conservation Council (a 350,000-member coalition of sportsmen's clubs and a New York affiliate of both the National Wildlife Federation and the National Rifle Association). Boice, widely regarded as a consensus builder, could not have been more removed from Abbie Hoffman in terms of management style.

During the first GLU meeting, a series of policy resolutions was adopted. In addition to taking stands against toxic pollution, winter navigation, and diversions, the group declared its support for a U.S.-Canadian Air Quality Agreement to eliminate acid rain, modeled on the Great Lakes Water Quality Agreement. The group also supported the acquisition and improvement of national park lands in the Great Lakes region, and opposed the Reagan Administration Interior Department's parks policies. Finally, the group expressed its support for renewal of clean-water and clean-air legislation in the U.S., and for increased funding for Great Lakes research and water quality monitoring.<sup>103</sup>

#### D. *Strategizing and Gaining Leverage*

Between the first annual meeting and the review and renegotiation of the Water Quality Agreement in 1987, Great Lakes United grew steadily in numbers and influence. By 1986, membership had grown to over 200 diverse groups, some with hundreds or more of individual

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101. *Abbie Hoffman, MUCC Split With Great Lakes Group*, THE BAY CITY TIMES, Nov. 22, 1982, at 10A.

102. *Great Lakes Coalition Born*, *supra* note 100.

103. Great Lakes United, Resolution minutes, Annual Board Meeting, Detroit, Mich. (May 7, 1983) (on file with *Great Lakes United*).

members from the U.S. and Canada, all "striving for proper management and protection of the Great Lakes and St. Lawrence River."<sup>104</sup> A full-time executive director and support staff were hired, and headquarters were established in Buffalo, New York at Medaille College. Plans were under way to open a Canadian office in Windsor, Ontario.

1. *Strategy.* As noted earlier, the Great Lakes Water Quality Agreement<sup>105</sup> was scheduled for formal review in 1987. The leadership of Great Lakes United saw this review as an opportunity to draw attention to the Agreement's principles, which it believed were still largely ignored by the Parties. Because GLU was a relatively new voice in the basin, its officers had been considering a "tour" of the lakes, in the form of public meetings throughout the basin similar in scope and intent to the PLUARG meetings.<sup>106</sup>

The idea for a tour originated in 1985 as a way to promote membership in GLU. By the following year, the concept converged with the officers' concerns about the upcoming scheduled review of the Agreement. There seemed to be reason to worry about the fate of the Agreement under review. The Reagan White House and Prime Minister Mulroney's Progressive Conservative government in Ottawa were perceived to be hostile to federal action on behalf of the environment—the very kind promised by the Agreement.

John Jackson, a veteran organizer around issues of toxic waste dumps in the Province of Ontario, and a Great Lakes United activist, suggested that GLU, rather than just doing a promotional tour, should organize a series of "public hearings" around the basin to gather testimony regarding government progress in implementing the Agreement. The "hearings" were intended to raise GLU's profile in the region, build a base of support for the principles and goals of the Agreement,<sup>107</sup> and preempt and prompt U.S. and Canadian government officials who had not yet discussed publicly their plans for the upcoming Agreement review.

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104. Great Lakes United (informational brochure, on file with author).

105. See 1978 GLWQA, *supra* note 1.

106. Although the level of public participation and type of input differed, in both instances participation was sought basin-wide from both Canada and the U.S. to gain public support and credibility. The PLUARG and the GLU meetings differed somewhat in the public sectors involved and in the final documentation. However, the general success of each in attaining its objectives greatly influenced subsequent bilateral negotiations. Becker Interview, *supra* note 45.

107. Cf. INTERNATIONAL JOINT COMMISSION, POLLUTION IN THE GREAT LAKES BASIN FROM LAND USE ACTIVITIES, REPORT TO THE GOVERNMENTS OF THE UNITED STATES AND CANADA 5 (1980).

The GLU Board of Directors approved the concept of the citizen hearings and established a Water Quality Task Force under GLU by-laws. The task force sought and received funding from the C.S. Mott and Joyce Foundations. GLU also hired a Water Quality Task Force coordinator, Tim Eder, who later became one of GLU's representatives on the U.S. team for the Agreement renegotiations. Before joining GLU, Eder had worked with Save the River in upstate New York.

Eder and GLU organized nineteen "Citizen Hearings on Great Lakes Water Pollution" in cities across the Great Lakes basin. GLU estimates that over 1,200 people attended, of which 382 made statements at the hearings or mailed in comments. Members of the GLU task force received testimony from residents, and joined with local organizations and reporters on tours, often in boats, to witness environmental problems in their area. They saw open piles of coal, salt, and scrap iron lining the banks of the Milwaukee Harbor, feeding lead, chromium, mercury, arsenic, and phenols to the Harbor's already contaminated sediments. In Green Bay, they toured paper mills where polychlorobenzene was legally discharged in pulp mill waste water. From their boat, GLU task force members were shown several waste dumps on the shores of Lake Superior at Duluth. In Massena, New York, the group toured the St. Lawrence River near the General Motors and Alcoa industrial waste sites where they heard a New York Department of Environmental Conservation official describe the "contaminant plume of considerable proportion migrating from the industrial landfill and discharging to the St. Lawrence River."<sup>108</sup>

These scenes were repeated throughout the nineteen stops on the tour. The testimony gathered was emotional and dramatic. "What we pump down the sewers this week will end up in our cornflakes next year and eventually in my blood and fatty tissues," argued a witness in Toronto.<sup>109</sup> A Native American leader in Cornwall said that Native American families used to eat 20 to 30 pounds of fish every week but now they warn children and women not to eat any fish because the flesh is contaminated.<sup>110</sup> A deformed cormorant found locally was at the hearing table in Green Bay. In Montreal, biologists studying the decline of Beluga whale populations in the St. Lawrence estuary reported

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108. WATER QUALITY TASK FORCE, GREAT LAKES UNITED, UNFULFILLED PROMISES: A CITIZENS REVIEW OF THE INTERNATIONAL GREAT LAKES WATER QUALITY AGREEMENT 19-20 (1987) [hereinafter UNFULFILLED PROMISES].

109. *Id.* at 3.

110. *Id.* at 19.

finding whale carcasses with high concentrations of PCBs, mirex, and dioxin in their flesh.<sup>111</sup>

2. *Taking a Stand: Great Lakes United's Position.* From the citizen hearings, GLU compiled a review of its findings and recommendations:<sup>112</sup> that governments act seriously on commitments to end the release of persistent toxic substances into the lakes; that governments and the International Joint Commission better inform the public on water-quality issues and involve citizens on all levels of water-quality decision-making; that more research be conducted on human health effects of toxics at levels found in the lakes; that new chemicals be tested for toxicity and persistence before they are allowed to be manufactured and used; that methods be improved for eliminating in-place pollutants in contaminated sediments; that the practices of overflow dredging and open-lake disposal of contaminated dredge spoils be ended; and, that the International Joint Commission become more active in government programs and involve the public in all aspects of IJC work.

The first recommendation in the report addressed the scheduled 1987 Protocol. According to the report:

Most of those who spoke at the hearings emphasized the need for immediate actions to correct water quality problems. Renegotiation of the Great Lakes Water Quality Agreement at this time would mean the diversion of resources and a resultant delay in addressing these problems. In addition, many speakers expressed little faith in the Reagan and Mulroney administrations' commitment to protecting the environment. They feared that if opened up for renegotiation at this time, the Agreement would be weakened.

These two concerns combined with statements from all Parties at the hearings that the Agreement is a document that encourages positive actions and does not discourage such action, leads the GLU Task Force to conclude that the Agreement should not be renegotiated now.

Therefore, the GLU Task Force recommends that the two federal governments not renegotiate the Great Lakes Water Quality Agreement at this time.<sup>113</sup>

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111. *Id.* at 20.

112. *Id.* at 47-79.

113. *Id.* at 6-7, 49.

GLU's resistance to tampering with the Agreement echoed the sentiments of the participants at the hearings, as well as the conclusion drawn by a study committee of the Royal Society of Canada and the National Research Council of the United States (RSC-NRC) which had reviewed the Agreement in 1984.<sup>114</sup> Both the scientific and environmental advocates' reviews concluded that the GLWQA was fundamentally sound and required implementation by the Parties rather than renegotiation and amendment.<sup>115</sup> Both reports were made widely available to governments and the media. According to Ron Shimizu, who was responsible for Environment Canada's implementation of the GLWQA, GLU's emphasis on the positive features of the Agreement which must not be tampered with, "set the tone, the public parameters of acceptability around which the governments could conduct a review."<sup>116</sup>

3. *Party Positions.* Despite GLU's anxiety that opening the Agreement to negotiations at this time could be a prelude to disaster and a greatly weakened Agreement, the individual environmental officials in charge of the review—Ron Shimizu of Canada, and E.P.A.'s Kent Fuller of the U.S.—were committed to the basic framework of the Agreement and communicated that sentiment to each other.<sup>117</sup> Both believed that the GLWQA could benefit from two kinds of amendments: technical changes that would specify governmental commitments to respond to emerging pollution problems; and management changes that would clarify roles and make the governments more accountable for their commitments by linking the goals of the GLWQA more closely with specific program elements.

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114. The result was the NRC-RSC Report, *supra* note 32, issued in 1985. It has been described by leading non-governmental scientific organizations as a major binational collaborative assessment of the ecosystem approach as committed under the Great Lakes Water Quality Agreements. See Don Munton, *Toward a More Accountable Process: The Royal Society—National Research Council Report*, in Caldwell, *PERSPECTIVES*, *supra* note 44, at 299-317 [hereinafter Munton]. Munton summarizes the recommendations and conclusions of the report. Regarding Great Lakes institutions, he observes that an ecosystem approach can be achieved through changes in the "processes" of governance rather than the "structures" of governance, thus requiring greater accountability on commitments made to the public under the Great Lakes Water Quality Agreements. The report, he notes, calls for "responsibilities and commitments of the governments to be made clear and unambiguous." *Id.*

115. See, e.g., NRC-RSC Report, *supra* note 32.

116. Telephone Interview with Ron Shimizu, Faculty Member, University of Toronto Institute of Environmental Studies (Aug. 20, 1991).

117. Interview with Ron Shimizu, *supra* note 116, in Chicago, Ill. (Jan. 18, 1992).



Although most of the public comment and review centered on specific pollution-related problems, the bureaucrats charged with preparing their government's positions for the negotiations were also concerned about water quality management issues, specifically, the vague distribution of responsibilities between the IJC and the governments. Kent Fuller wanted to modify the GLWQA so that its lofty goals would be explicitly related to federal water quality programs and commitments in each country. As the Agreement stood on the eve of its review, goals were established and the IJC reported on progress, but there were few practical mechanisms to tie the goals to particular programs. This lack of accountability further complicated what was already a daunting evaluation task.<sup>118</sup>

One of the binational programs with the highest profile, and the program of most concern to many of the people who had spoken at the Great Lakes United hearings, was the Remedial Action Plan (RAP) program initiated by the IJC Water Quality Board in 1985.<sup>119</sup> The program called for cleanup plans to be developed for each of forty-two locations across the U.S. and Canada, the most heavily polluted rivers and harbors, designated "Areas of Concern."

4. *Remedial Action Plans.* It is necessary to consider at this point the history and recent evolution of the RAP program. In many ways, the process of developing and implementing RAPs reflects trends in the relationships between non-governmental organizations, intergovernmental organizations like the IJC, national governments, and state, provincial, and local jurisdictions.

The Remedial Action Plan program marks a departure from the traditional IJC activities. In the past, the IJC made recommendations only when both governments asked for specific studies. The type of recommendations and the range of information expected by the governments was clearly delineated in the reference, or request, issued jointly by the two national governments. Because *both* nations had to agree before any issue could be referred to the Commission, referenced issues tended to be those in which mutual interests were considerable and obvious. Care was taken not to appear to threaten national sovereignty. In fact, some observers have credited the Commission's

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118. Interview with Kent Fuller, *supra* note 23, in Ann Arbor, Mich. (Oct. 19, 1991).

119. See generally GREAT LAKES WATER QUALITY BOARD, INTERNATIONAL JOINT COMMISSION, REVIEW AND EVALUATION OF THE GREAT LAKES RAP PROGRAM (1991).

steadfast avoidance of bilateral conflict through the reference procedure for its longevity and success.<sup>120</sup>

Prior to the RAP program, the IJC acted for the most part only at the behest of the federal governments. An apt phrase used to describe this relationship might be: the governments do and the commissioners review. The RAP program represented a different tack in that the IJC, through its Water Quality Board, in effect directed the Parties to develop cleanup plans. The IJC determined what should be in a RAP, what criteria should be applied in evaluating the RAP, and what constituted adequate public consultation and citizen participation. In addition, individual IJC staff members, by becoming involved in local watershed planning, were developing professional, personal, and political relationships with community activists and local and state officials who were charged with producing the RAPs. By becoming involved in water quality planning processes at subnational levels, the IJC risked being perceived by the Parties as overreaching its mandate and meddling in sovereign affairs.

The IJC found itself in a conundrum. The severe but localized contamination in the areas of concern posed a limit on further progress in Great Lakes cleanup. Unless water quality in these areas was improved, the objectives of the GLWQA were not likely to be achieved. But the areas of concern were by definition *local* problems requiring *local* efforts and investment to remediate. How could the IJC, an international body responsible to the federal governments, motivate local communities to take responsibility for their piece of the ecosystem? It seemed crucial to involve as many influential parts of the community as possible. The IJC in 1987 recommended that "all levels of government take steps to foster community support and involvement in developing and implementing the remedial action plans."<sup>121</sup> According to the IJC: "[E]ach citizen can play a valuable role in the RAP process, by contributing information on Areas of Concern and providing support for the development and implementation of the plan. This endeavor can only be successful if a concerned public is involved in developing and implementing each remedial action plan."<sup>122</sup>

By encouraging public participation in remedial action plans, the IJC was, in the environmental politics of the late 1980s, necessarily

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120. *E.g.*, ENVIRONMENTAL DIPLOMACY, *supra* note 8, at 52-55.

121. INTERNATIONAL JOINT COMMISSION, THIRD BIENNIAL REPORT UNDER THE GREAT LAKES WATER QUALITY AGREEMENT OF 1978 TO THE GOVERNMENTS OF THE UNITED STATES AND CANADA AND THE STATE AND PROVINCIAL GOVERNMENTS OF THE GREAT LAKES BASIN 30 (1987).

122. INTERNATIONAL JOINT COMMISSION, REMEDIAL ACTION PLANS FOR AREAS OF CONCERN (informational brochure, on file with author).

becoming involved with environmental activists and activism. It was carving out new relationships between jurisdictions and citizens in an unprecedented way.

The IJC was not necessarily interested in participatory democracy as an end in itself, nor as any principled political position.<sup>123</sup> Rather, the IJC sought a means to gain support for its preferred policies, those based on an ecosystem approach to RAPs. Each RAP must embody a comprehensive ecosystem approach to restoring and protecting beneficial uses in the area of concern.<sup>124</sup> The kind of public participation sought by the IJC officials promoting RAPs was the sort provided by an involved constituency. The burden of promoting the RAPs, therefore, fell to local environmental activists with recognized interests and credibility who also shared a personal sense of responsibility broad enough to include the Great Lakes ecosystem as a whole. These characteristics and profiles describe many of the local activists involved in Great Lakes United member organizations and other environmental NGOs. Thus, to make the RAPs work as intended, the IJC found itself in alliance with local environmental activists, at the risk of alienating some of the very state and local officials responsible for delivering a RAP to the IJC.<sup>125</sup>

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123. See Swineheart, *supra* note 52 (reviewing participation in International Joint Commission public hearings).

124. For further discussion of RAPs, see generally JOHN H. HARTIG & MICHAEL ZARULL, UNDER RAPs: TOWARD GRASSROOTS ECOLOGICAL DEMOCRACY IN THE GREAT LAKES BASIN (1992); Barry B. Boyer, *Creating, Managing and Postponing Conflict Through Remedial Action Plans*, in ENVIRONMENTAL DISPUTE RESOLUTION IN THE GREAT LAKES REGION 94-110 (W. Flint & L.S. Bankert eds., 1988).

125. This trend continued beyond the period discussed here. The 1989 Biennial meeting of the IJC was dominated by Great Lakes activists. More than 800 people were in attendance, many of them brought in for the event by Greenpeace, which had recently organized a Great Lakes International office. Greenpeace had promised to hold a separate meeting at the time of the IJC Biennial to protest, and perhaps disrupt the official meetings. In a move to preempt that scenario, Greenpeace's spokesperson, Joyce McLean, was invited by the IJC to give the keynote address. Her speech was preceded by a ritual procession of puppets and banners representing the fish and wildlife harmed by toxic pollution. The contrasts between the countercultural rite and the pomp and circumstance of an official international gathering replete with color guard and plenty of flags was strikingly worthy of the legacy of Abbie Hoffman. From the podium, Joyce McLean chided the Commissioners by stating that rarely were their recommendations heeded by the Parties. Perhaps, she suggested, they should resign. Instead, the IJC issued a report on the 1989 meeting in which it said, in addition to the comment which heads this study, "the increasing level of public concern for the Great Lakes ecosystem and insistence on governmental response to Agreement objectives were strikingly evident, and outspokenly vented, at the Commission's recent Biennial meeting." IJC FIFTH BIENNIAL REPORT, *supra* note 18, at 2. The fact that Joyce McLean's comments were

The Commission's difficulties resulted from a contradiction inherent in the RAP program and its ecosystem approach: benefits accrue to the entire ecosystem while the costs are borne disproportionately at the local level. The RAP program was intended to make progress in polluted areas of concern that consistently failed to meet the water quality objectives of the Agreement. The ecological significance of some of these hot-spots was primarily in their basin-wide impact. However, the political significance was in the fact that a local community would be asked to shoulder the responsibilities of planning and implementing an expensive clean-up program which would be unlikely to result in any substantial local benefit. Furthermore, many of the hot-spots were heavily industrialized or otherwise degraded areas which lacked a politically powerful resident constituency. The IJC-designated areas may compete as well with other environmental problems in the local area, some of which might be more visible, or have more direct impact on the local community. The success of many of the RAPs may depend in the end on the IJC's ability to build environmentally astute community advocates in the RAP areas. Such a condition for success for one of the IJC's most cherished programs could easily lead to governmental efforts to reign in the scope of the Commission's activities.

This tug and pull between the governments and the IJC was nothing particularly new. Ever since its first reference reports on water pollution early in the century, the Commissioners have occasionally recommended increased authority for the IJC. In 1981, the Commission proposed a new and expanded role for itself beyond its traditional role as scientific and technical advisor to the governments,<sup>126</sup> suggesting something like the role it adopted for itself in the RAP program. This recommendation was rejected by the Office of Canadian Affairs in the U.S. State Department which told the IJC that, "rather than a broadening of the Commission's Great Lakes focus as proposed, the State Department believes that the Commission should continue to devote its

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memorable could be seen at the 1991 Biennial when the U.S. Chairman of the IJC, Gordon Durnil, referred to them several times as being responsible for his personal reconsideration of his role as a Commissioner. The 1991 Biennial was also noteworthy for the number of times the Commissioners reminded the public that the IJC's role was merely advisory, and that the Commissioners had no power to implement the programs that some activists were urging. Ironically, Joyce McLean attended the 1991 Biennial as a newly appointed official in the environment ministry of the Ontario Provincial government.

126. See INTERNATIONAL JOINT COMMISSION, FIRST BIENNIAL REPORT UNDER THE GREAT LAKES WATER QUALITY AGREEMENT OF 1978 30 (1982).

efforts with greater precision to the technical questions specified in the 1978 Agreement."<sup>127</sup>

The National Research Council/Royal Society of Canada (NRC/RSC) report was also critical of the IJC's expanded role, in particular the Water Quality Board. The report recommended that "the coordinating responsibilities for the control programs that implement the Agreement be left to the Parties, rather than to the Water Quality Board. This coordination should be handled through bilateral government-to-government meetings."<sup>128</sup> According to one commentator, the purpose of the NRC/RSC criticisms was not to reduce the Commission's importance, but rather to increase its independence, and therefore its effectiveness. Governments should clearly be responsible and accountable for the commitments they make under the Agreement.<sup>129</sup>

By the time of the 1987 Protocol, the RAP program had become one of the most active water quality efforts in both countries. Yet, prior to the 1987 Protocol, the program itself was not institutionalized in the body of the GLWQA. Thus, a major Great Lakes anti-pollution effort was outside the official agreement framework, a kind of rogue influence, posing serious structural and political challenges to the water-quality bureaucracies in both countries and all the states and provinces. The RAP program bore the burden of relying almost exclusively on popular political support for its legitimacy.

Professionals associated with the program wanted to ensure governmental accountability for the RAPs and connect RAP programs to specific and measurable endpoints in order to strengthen their legitimacy and raise their ranking on government priority lists.<sup>130</sup> The RAP situation added to the sense that management functions under the GLWQA needed clarification, and that the specific responsibilities for developing and implementing RAPs needed to be expressed and embraced by the governments through the Agreement. It was among the goals of both the Canadian and U.S. governments, therefore, to add specific language to the Agreement to formally incorporate the RAPs into the GLWQA. With such language, the Parties would be able to

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127. U.S. STATE DEPARTMENT, U.S. RESPONSE TO THE INTERNATIONAL JOINT COMMISSION'S FIRST BIENNIAL REPORT UNDER THE GREAT LAKES WATER QUALITY AGREEMENT OF 1978 (Feb. 1978), *quoted in* Joseph T. Jockel & Alan M. Schwartz, *The Changing Environmental Role of the Canada-United States International Joint Commission*, 8 ENVTL. REV. 236, 247 (1984).

128. NRC-RSC Report, *supra* note 32, at 11-12.

129. Munton, *supra* note 114, at 300.

130. Interview with Kent Fuller, *supra* note 23, in Ann Arbor, Mich. (Oct. 19, 1991).

reassert their authority over the planning process, even if the Annex fully accommodated the original IJC guidelines.

### E. *Great Lakes United's Concerns*

In reviewing the GLWQA, GLU advocates expressed complex and contradictory opinions on the role of the IJC. On one hand, the IJC provided a focal point for the many water quality activities in the basin. Its mandate from the 1909 Boundary Water Treaty preceded and was not unlike what GLU understood its mandate to be: looking out for the interests of the entire watershed against the parochial regional and national interests throughout the basin.<sup>131</sup> On the other hand, the IJC had no authority to take meaningful regulatory or cleanup action, and little authority in the way of financial resources. Responsibilities that were left to the IJC, it was feared, would be those the governments preferred to avoid. GLU and other NGOs preferred an IJC which could and would prod the governments and apply, where appropriate, the pressure of public concern to goad the Parties, states, and provinces into action.

These contradictory opinions were never really debated or resolved in the strategy deliberations within the organization. Instead, most of the effort was put into achieving the goal of protecting the Agreement from what was feared might be cynical maneuvers by the conservative governments of both Canada and the U.S. For the most part the IJC was perceived by GLU strategists as another governmental institution to be lobbied. The goal of GLU's lobbying was to convince the Commissioners to take an activist stance in promoting environmentalist positions before the governments. The fact that the IJC was, as a treaty organization, a creature of governments and not likely to be successful as an independent activist organization, was of little concern to the activists.<sup>132</sup>

The stance taken by both Parties in preparation for the 1987 Protocol was not publicly critical of the IJC. Their position instead was that accountability and management for Agreement activities and responsibilities needed to be made explicit. The review and renegotiation provided an opportunity to clarify roles and responsibilities. Nonetheless, while representatives of several government agencies, states, and provinces participated with the citizen group representatives, the absence from the negotiations of IJC representatives, even as

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131. See Boundary Waters Treaty, *supra* note 9.

132. See John Jackson & Tim Eder, *GLU Hearings Draw Citizen's, Recommendations*, GREAT LAKES UNITED, Fall 1986, at 1-2.

technical advisors, was noteworthy.<sup>133</sup> As we shall see, the 1987 Protocol eventually adopted reasserted the primacy of the Parties over the IJC in Agreement activities and placed the future of the IJC as an effective binational organization into question.<sup>134</sup>

#### IV. THE 1987 REVIEW AND RENEGOTIATION OF THE GLWQA

Great Lakes United's citizen hearings and the widely publicized NRC/RCS review of the GLWQA increased the Agreement's profile and made it clear to U.S. and Canadian environmental agencies that a vocal and organized constituency supported the Agreement's purposes. As a result, beginning early in 1987, both sides went to unprecedented lengths to include the public from the beginning stages of the review process. Shortly after the Parties began preparing draft position statements and proposed amendments, they consulted with a range of public representatives.

In Canada, both the federal and provincial environment agencies, including their top administrators, held meetings with citizens groups to discuss the Agreement. Even preliminary drafts of amendments which the Canadian government was considering proposing to the American government were given to key Canadian environmentalists for review and comment. Environment Canada and the Ontario Ministry of the Environment (MOE) co-hosted an open workshop in July attended by scientists, representatives of labor, government agencies, industry associations, attorneys, environmental groups, native groups, and educational institutions. Advance materials were circulated discussing possible amendment areas, including RAPs, groundwater contamination,

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133. The Canadian and American co-chairs of the IJC Water Quality Board, Elizabeth Dowdswell and Val Adamkus, while present at the negotiations, represented other agencies, such as Environment Canada, and the U.S. Environmental Protection Agency, respectively.

134. The IJC's position has eroded since the signing of the 1987 Protocol. The United States in particular appears to have withdrawn some support from the IJC. This can be seen in the limited participation of senior officials from federal and state agencies in the RAPs. IJC officials have had increasing difficulty obtaining necessary information from U.S. government agencies relative to monitoring the GLWQA objectives. As a result of the 1987 Protocol's shifting of reporting responsibilities to the governments, the IJC dissolved its committee structure, where governmental officials had traditionally contributed their support to IJC activities. *Present Activities and Future Needs of Federal Programs Directed at Improving the Water Quality of the Great Lakes: Hearing Before the Subcomm. on Oceanography, Great Lakes and the Outer Continental Shelf of the House Comm. on Merchant Marine and Fisheries*, 102d Cong., 1st Sess. 15 (1991) (statement of Jack Manno, Associate Director, Great Lakes Research Consortium).

air-borne pollutants, contaminated sediments, and research needs. Following the workshops, Environment Canada and MOE held public meetings in Kingston, Windsor, and Sault Ste. Marie, Ontario.

The U.S. also provided opportunities for public comment on the American positions. However, these opportunities, in general, were less organized and attended by fewer people than the public meetings in Canada.<sup>135</sup> Nevertheless, draft positions were widely circulated, both in original amendment form, and later in an Annex version. This was in response to the widely expressed opinion that changes should only be made in Annexes. The draft amendments were also circulated for comment to interested federal and state agencies. A U.S. caucus was organized to derive a position for negotiations with the Canadians. It included representatives of the Environmental Protection Agency (EPA), the Coast Guard, Office of Management and Budget, Army Corps of Engineers, the National Oceanic and Atmospheric Administration, the Department of Agriculture, and the Fish and Wildlife Service. The eight Great Lakes states each were involved through representatives appointed by the states' governors. Three of these states were chosen by the others to represent the eight as participants in the U.S. caucus and in the binational negotiations. According to a summary of the review process:

Review of the Agreement quickly reached consensus on five conclusions which served as assumptions throughout the process of drafting amendments.

- Existing Agreement is basically sound.
- The purpose and general goals and objectives must not be changed.
- It would be desirable to bring the Agreement up-to-date.
- It would be desirable to tighten accountability and management.
- Review and amendment must be completed quickly to avoid diverting resources from implementing the existing Agreement.<sup>136</sup>

After it became clear that the governments intended to proceed with some changes to the Agreement, GLU's leaders shifted strategy. They no longer insisted that the Agreement remain untouched, though they continued to express that preference. They also urged that, if the

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135. Swineheart, *supra* note 52, at 146.

136. Interview with Kent Fuller, *supra* note 23, in Ann Arbor, Mich. (Oct. 21, 1991).



Agreement was to be altered, formal amendments to the body of the Agreement be avoided by placing all changes in Annexes. Furthermore, if changes were to be proposed, they should be considered with the full participation of the public. Great Lakes United's leadership summarized the position GLU had presented to U.S. and Canadian officials and explained:

The reason we insist on new Annexes only is simple: to protect the strong provisions of the existing Agreement, such as zero discharge and virtual elimination of persistent toxic substances, from being weakened. We believe that the only thing that should be on the negotiating table is new Annexes or supplements to existing Annexes. . . . The public should have a major role in the actual negotiations. GLU has petitioned officials in both countries to grant representatives of organizations such as GLU 'observer status' in the negotiations."<sup>137</sup>

A belief in environmental advocacy through participatory democracy had been central to GLU's political principles. This belief rested on the assumption that unless meaningful public participation was broadly encouraged, the only interests represented and articulated in the decision-making discourse would be those with the most at stake financially and professionally, such as regulated industries, polluters (especially past polluters, the so-called responsible parties), polluters' consultants, and the professional staff of the environmental agencies. According to this view, even when government agency personnel are inclined to defend the public's health and welfare and its right to a healthy environment, they are often overwhelmed by the short-term logic of economic expediency. The instinct of the civil servant to represent broader public interests has to be supported, encouraged, and, where absent, demanded. This, GLU believes, is one of the roles of the environmental advocate in the decision-making process.

Even when governments undertake public participation and public consultation activities, they often do so in a manner suggesting that government's responsibility is to strike a balance between competing stakeholder interests. This suggests that all stakeholder interests are of equal value, and that each stakeholder has equal power, ability, and motivation to articulate and defend his or her interests. Yet stakeholder rights and interests are multidimensional, and neither power nor costs

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137. Memorandum from John Jackson, Vice-President of Great Lakes United, and Tim Eder, Staff Member of the National Wildlife Federation, to People Interested in the Future of the Great Lakes Water Quality Agreement (Sept. 10, 1987) (on file with author).

and benefits are equally distributed. Furthermore, in the view of environmentalists, the right to pollution-free waters should be given more weight than the right to use those waters to discharge wastes. One way for a government to clarify rights, responsibilities, and overriding interests is to articulate in a public document a set of principles and goals to which that government is committed. This kind of statement could embody overriding principles and, where those principles are inimical to certain special interests and privileges, they ought not be weakened to accommodate those special interests. The Great Lakes Water Quality Agreement is just such a document, and as an international agreement, it has the additional authority created by the history of bilateral relations and mutual treaty obligations.

GLU recognized the importance of the GLWQA as a statement of principles and placed significant organizational emphasis on defending it. When GLU first approached administrators in EPA and Environment Canada requesting to be part of the binational review and amendment process, it was a bold, if understandable, move. Direct participation by NGOs in binational affairs was rare, but not without precedent. Mark Van Putten, a lawyer and Director of the National Wildlife Federation's Great Lakes Natural Resources Center, knew of a migratory waterfowl treaty between Alaska and Canada in which certain sportsmen's groups affiliated with the Wildlife Federation had officially participated.<sup>138</sup> According to Tim Eder, it was a crucial realization and, based on Van Putten's example, GLU began to insist with increasing confidence that the governments give GLU's representatives a seat at the negotiating table.<sup>139</sup>

GLU's case was straightforward. Its leaders had always demanded that citizens be part of the decision-making process. Now that decisions were being made at the bilateral level, their demand would be the same. It sincerely believed that as a result of the success of its citizens hearings it had earned the right to represent and advocate broad citizen interest in the negotiation. It felt obligated to the people who had testified at the public hearings to make sure their opinions regarding the Agreement were heard. GLU believed that it and other environmental advocacy groups represented interests shared across the international boundary that were broader or more fundamental than specific national interests. These interests have been referred to those of the "Great Lakes constituency." This formulation was, and still is, inherent

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138. Interview with Mark Van Putten, Director, National Wildlife Federation, in Chicago, Ill. (May 14, 1991).

139. Interview with Tim Eder, *supra* note 70, in Traverse City, Mich. (Sept. 28, 1991).

to GLU's existence as a binational citizens group whose identity (even, perhaps, its definition of homeland) consists of an ecological region with watershed frontiers rather than political borders. GLU's participation in the bilateral review and negotiations would, therefore, represent a fundamental challenge to the legitimacy of the nation-state system for issues of environmental protection, even if the Parties involved did not necessarily view GLU's participation in that way.

Once GLU had decided to petition officials of both governments for representation, according to GLU's Tim Eder, "[we] had to pull out all the stops and play every card in our bag to get a seat at the table. That didn't just happen."<sup>140</sup> The campaign to gain observer status began in June 1987. GLU wrote letters to the foreign ministries and environmental agencies of both countries. For several months, it received neither an answer nor even an acknowledgment of its request. GLU let both governments know that it was going to persist until an answer was received.

One decisive tactic was that all the NGOs represented (Sierra Club, NWF, and GLU) had built alliances with many of Great Lakes representatives in Congress and the Senate. GLU contacted congressional supporters, particularly Congressmen Overstar (D-MI) and Nowak (D-NY), who had been leaders in Congress on several Great Lakes issues, and asked them to intercede with the State Department on their behalf. Furthermore, the Senate Great Lakes delegation circulated a letter among the Northeast-Midwest Congressional delegation stating: "[W]e recommend that some community-based citizen group be given observer status at these discussions."<sup>141</sup>

GLU also leveraged the positions of the two federal environmental agencies. Ron Shimizu of Environment Canada told Eder and Jackson that his agency did not have a problem with GLU's request for observer status, but that he believed the U.S. would not agree. Then, in discussions with EPA's Kent Fuller, Eder and Jackson reported what Environment Canada had said, hoping to encourage Fuller to support their request.<sup>142</sup> When GLU appealed to the U.S. State Department directly, according to Eder, officials there never discussed environmental issues, but instead expressed foreign policy concerns about their desire not to complicate U.S.-Canadian relations by involving the NGOs in the

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140. *Id.*

141. *Id.*

142. Interview with John Jackson, President, Great Lakes United, in Walpole Island, Ont. (July 12, 1991); Interview with Tim Eder, *supra* note 70, in Traverse City, Mich. (Sept. 28, 1991); Interview with Ron Shimizu, *supra* note 116, in Chicago, Ill. (Jan. 18, 1992).

negotiation. A parallel lobbying effort was undertaken in Canada. Canadian GLU representatives met with Canadian Environmental Minister Tom McMillan as well as Elizabeth Dowdswell and Ron Shimizu, senior bureaucrats in Environment Canada.

In the end, the campaign was successful. According to EPA's Fuller who was on a on full time assignment to develop EPA's position for the GLWQA review, the NGOs had successfully convinced him and others within the EPA that NGOs were interested in "cooperating, not disrupting."<sup>143</sup> The personality of Fred Jones Hall, the State Department official given responsibility for the GLWQA review, also played a major role in sanctioning NGO participation. Hall, new to the State Department, was a successful Texas businessman with a "can-do" attitude. He informed EPA members of the U.S. delegation that he would rely on EPA's technical advice. After considering the precedents cited by Van Putten, Hall agreed to invite NGO observers to the official U.S. delegation. Similarly, the Canadian Department of External Affairs relied on Environment Canada's judgment.<sup>144</sup> Minister of the Environment Tom McMillan wrote to Joe Clark, Secretary of State for External Affairs, in August, stating, "Although I realize that it is unusual to involve the public directly in government-to-government consultative sessions, I believe that the presence of GLU would be useful."<sup>145</sup>

The Canadian letter of invitation came from Joe Clark, dated September 24, 1987, and was addressed to John Jackson, Canadian Vice President of Great Lakes United. In the letter the Secretary states:

I am well aware of the work your organization has done in conducting an independent review of the Agreement and of your concern that the Great Lakes be adequately protected from pollution.

. . . [W]e see merit in using the review to try and strengthen the Great Lakes Water Quality Agreement by introducing changes to it in several areas. In keeping with the advice given to governments by the IJC, the Royal Society of Canada/National Research Council of the United States of America and Great Lakes United, we have endeavored to keep key principles and provisions of this basically sound Agreement intact.

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143. Interview with Kent Fuller, *supra* note 23.

144. Interview with Ron Shimizu, *supra* note 116, in Chicago, Ill. (Jan. 18, 1992).

145. John Jackson, *Citizen Involvement in the Review of the Great Lakes Water Quality Agreement* 6 (1991) (unpublished manuscript, on file with author) [hereinafter *Citizen Involvement*].

With respect to your request for observer status at the bilateral review, you will appreciate that the presence of a binational nongovernmental group at the formal review of an international agreement by its signatories raises some interesting issues of propriety and precedent. Nonetheless, in view of Great Lakes United's credentials as a serious and responsible group and our collective interest in ensuring the best possible review of the Agreement, I am pleased to invite you and one other member of the Canadian section of Great Lakes United to participate as observers to the Canadian delegation.<sup>146</sup>

The GLU Board selected Kate Davies, a member of the Board of Directors and the head of the City of Toronto's Department of Environmental Health, to be the other Canadian GLU representative. The U.S. State Department's invitation came at the very last minute, only nine days before the caucus meeting where the U.S. negotiating position would be finalized. It was addressed to David Miller, GLU's executive director, and did not specify who the observer should be. In separate letters, the State Department also invited the Sierra Club and the National Wildlife Federation to send observers.<sup>147</sup> Eder believed that the most important event leading to the formal invitation of U.S. observers occurred in August at an EPA-organized public hearing on the Agreement held in Buffalo, New York. State Department representatives attending this meeting heard testimony from GLU and from others speaking favorably of GLU's leadership.<sup>148</sup>

The letter from the U.S. State Department came from Fred Jones Hall, Deputy Assistant Secretary of State for European and Canadian Affairs, dated September 30, 1987. Unlike the letter from Canada, it expressed no particular acknowledgment of GLU's efforts or its qualifications for participation. It began, "I would like to give you an update on the U.S. Government review of the 1978 Great Lakes Water Quality Agreement and invite you to name an observer to our upcoming negotiations with Canada."<sup>149</sup> The remainder of the letter detailed the schedule of upcoming meetings.

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146. Joe Clark Letter, *supra* note 2.

147. Interview with Tim Eder, *supra* note 70, in *Traverse City Mich.* (Sept. 28, 1991); Interview with John Jackson, *supra* note 142.

148. Interview with Tim Eder, *supra* note 70, in *Traverse City Mich.* (Sept. 28, 1991).

149. Letter from Fred Hall Jones, Deputy Assistant Secretary for European and Canadian Affairs, U.S. Department of State, to David Miller, Executive Director of Great Lakes United (Sept. 30, 1987) (on file with the *Buffalo Environmental Law Journal*).

Tim Eder, who had been hired as a Field Coordinator to manage the citizen hearings, was appointed by the GLU Board as GLU's U.S. observer. Mark Van Putten, Director of National Wildlife Federation's Great Lakes Natural Resources Center, represented NWF. Jane Elder, Great Lakes regional Vice-President, represented Sierra Club.

Once they became members of the national delegations, the NGO observers had to pledge to abide by the requirements for confidentiality. This raised difficult problems for observers on both sides of the table. For example, GLU members John Jackson of Canada and Tim Eder of the U.S. had regularly conferred with each other on strategy and tactics prior to the negotiations, not only for winning representation at the table, but on what positions to advocate once there. Once each was a member of his country's delegation, this communication and similar discussions with the GLU Board and others had to be restricted.

This confidentiality mandate wasn't taken lightly by any of the observers. Would the GLU representatives feel compelled to confer if either the U.S. or Canadian side tried to weaken the argument? Would the required confidentiality contradict one of GLU's fundamental principles that the interests of the Great Lakes basin supersede narrow national interests? The issue was brought before the GLU Board for debate, and the Board voted unanimously that the observers should strictly adhere to the confidentiality requirements.<sup>150</sup> Ultimately, the confidentiality requirement was more troubling philosophically than practically. The technical staffs of the U.S. and Canadian delegations worked together so closely that by the time the separate American and Canadian caucuses met to set their national positions on October 9, 1987, the two nations had combined their separate proposals and prepared a unified draft for consideration.

Formal caucuses to finalize the national positions were held by the separate U.S. and Canadian delegations which included each delegation's NGO observers. While the government positions were drafted primarily by the EPA and Environment Canada, NGOs played a role in the drafting process. For example, even before being granted observer status, GLU representatives in Canada and the U.S. participated in various meetings with the environmental agency staff during the preparation phase of each country's draft positions. As a result of their participation, the NGOs were thoroughly versed in the proposed amendments and their rationales at the start of the formal caucuses. The U.S. and Canadian career diplomats played the role of referees, assuring that everyone understood and followed the rules of bilateral negotiations. A single formal negotiating session was held

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150. Interview with Tim Eder, *supra* note 70, in Traverse City, Mich. (Sept. 28, 1991).

between the U.S. and Canadian delegations on October 16, 1987 in Toronto.

During the formal negotiation the NGOs were present as observers, but did not sit at the main table as full participants. However, the NGOs were allowed full interactive participation in the "break-out" sessions where most of the revisions to the language of the Agreement were made. As such, the NGO representatives were involved in discussing every aspect of the Agreement. According to Eder, the NGO representatives were not observers, but full participants. The State Department officials recognized them, called on them, and listened to them. As the meetings progressed, the NGO representatives found themselves being turned to with increasing frequency, and few statements were made where the speaker did not look to them for a nod of approval.

The NGOs' level of technical knowledge and fluency was unmatched by any of the other participants, with the exception of the representatives of the environmental agencies. Another distinct advantage for the NGO observers was being part of a binational organization. Their familiarity with the proposals from both Parties and the internal politics of each gave them a much deeper understanding of the various proposals than the other representatives. Both Eder and Jackson felt that the process which allowed NGOs a very active role in reviewing and amending the agreement was the most important outcome. According to Eder, "the fact that we had a seat at the table meant that we took ownership of the Agreement, that we had a stake in it, and as a result we wanted to make sure that it would be implemented."<sup>151</sup> John Jackson wrote that "[i]t was widely known that non-government members were included in this stage of the review and renegotiation. As a result, there was a feeling within the environmental community that their concerns were being represented and protected during the actual negotiations."<sup>152</sup>

In the two years following the signing of the 1987 Protocol, public interest in the GLWQA increased immensely. Requests to the IJC's Great Lakes office for Agreement-related information rose 162 percent.<sup>153</sup> That is but one of several continuing expressions of broad public concern in Great Lakes issues.

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151. *Id.*

152. Citizen Involvement, *supra* note 145, at 8-9.

153. John Jackson & Tim Eder, *The Public's Role in Lake Management: The Experience in the Great Lakes*, in 2 GUIDELINES ON LAKE MANAGEMENT 31, 36 (M. Hashimoto ed., 1991).

## V. CONCLUSION

Although the case described here is unique in many ways, it is instructive in the study of global environmental politics. A number of intriguing lessons, developed more fully below, can be distilled: (1) international agreements and treaties can serve the political agendas embraced by environmental NGOs; (2) technological complexity provides NGOs with a niche to fill and a means to develop credibility; (3) NGOs have the ability to represent transnational interests; (4) NGO participation in national bureaucratic forums can serve as a guide in international forums; (5) transnational NGOs' technical expertise and political savvy make them authoritative negotiators; (6) familiarity and commonality of interests help to facilitate structured international environmental problem-solving; (7) international environmental agreements provide a basis for domestic change; (8) NGO participation can stretch traditional negotiating formats; and (9) the profitable interrelationship of international governmental organizations and NGOs must be developed with caution. Below, these nine lessons are identified and developed with discussion of how they played out in the 1987 Protocol negotiation process.

1) The first lesson demonstrated by the instant case is that international agreements and treaties often articulate the same broad purposes and goals embraced by NGOs. International agreements and treaties often articulate broad purposes and general goals attractive to environmental NGOs. Once adopted, the statements can be used to evidence an international commitment supporting an NGO's position on an issue. In the public domain, these agreements articulate a common vision and approach to politics and governance; they are akin to preambles of constitutions and declarations of independence. Their power transcends simple questions of implementation and enforcement. Even when they are not well implemented (perhaps, especially then), they can be strategically embraced and adopted by NGOs to mobilize public opinion, gain credibility, and pressure parties to adopt the policies which NGOs support. When NGOs adopt the defense of such agreements as a political tactic, they appear as representatives of the public's interest in the agreement's goals.

The NGOs involved in the present case, particularly Great Lakes United, embraced and identified with the GLWQA's goals and objectives. They used the terms of the Agreement to push both the U.S. and Canadian governments to adopt specific Great Lakes policies they supported. The NGOs were aware of the scheduled review of the Agreement and anticipated the potential issues. Of most concern was the fact that the conservative negotiating governments might weaken



the Agreement through political maneuvering. NGO members adopted policy resolutions in defense of the Agreement and their leaders advocated for the existence of a public interest in the Agreement's future. They preempted the governments by holding their own set of public hearings on the effectiveness of the Agreement, simultaneously raising the political stakes and building a strong case for NGOs' formal involvement as citizen representatives. Thus, NGOs effectively entered political negotiations as champions of the public interest.

2) The technical complexity of many environmental issues creates a knowledge gap into which NGO representatives can move. Technical expertise and fluency developed by NGOs can lend credibility to their positions and provide important leverage in negotiations. NGOs translate the technical issues into policy options, articulating their position, on the environmental consequences of alternative policy choices.

The GLWQA issues were highly technical and difficult to understand for almost everyone except the environmental agencies and the NGO representatives. The environmentalists shared a common vocabulary, and they also shared certain assumptions drawn from their common understandings of the environmental sciences and environmental politics. Career diplomats and bureaucrats from organizations like the U.S. Office of Management and Budget were inclined to defer to those who were fluent in the language of environmental science and regulation. The NGO representatives involved in this case, all highly articulate and knowledgeable, had a perhaps disproportionate influence in the negotiations. Their ability to translate the language of environment into the language of politics lent the NGOs a clear negotiating advantage.

3) By focusing on diffuse environmental issues like toxic contamination, global warming, ozone depletion, and loss of biodiversity, NGOs have expanded the definition of stakeholder. It is commonly understood that the resolution of these issues lies beyond the capacity of individual governments and thus requires international responses. It is equally true, though less appreciated, that these issues transcend not only national boundaries, but traditional "interest" boundaries as well. The spectrum of people with reason to participate in decision-making necessarily broadens, and hence the argument that governments ought to listen to a wider range of public voices is strengthened. The water quality problems addressed by the 1987 Protocol (primarily contamination by persistent toxic chemicals) are inherently diffuse and pervasive in the ecosystem. The sources of toxic contamination are multiple and widespread. At the individual level, the effects of exposure

are subtle, but the significance of these effects may be magnified when viewed at the global level. Like ozone depletion and global warming, specific instances of harm are difficult to find, whereas the credible threats are everywhere. The issue of toxics is unlike traditional water issues where the stakeholders are limited to users, polluters, and riparian owners. In the instant case, the sequence of events subtly permitted NGO participation as citizen representatives rather than as representatives of specific stakeholders. When dealing with toxic contaminants, the stakeholder can be anyone. The traditional conception of stakeholder, therefore, is necessarily broadened by the nature of the pollution. These are also the considerations affecting representation of stakeholder interests.

4) The movement toward NGO involvement in international environmental negotiations nearly reflects the movement toward increased public participation in bureaucratic decision-making. NGOs that formulate strategies for their participation in international forums can draw from the extensive experience and literature of public participation, especially in the United States and Canada. The lessons of this experience, however, must be considered in the context of the North American situation and evaluated for their applicability to international situations.

The NGOs in this case took the principled position that citizen participation was a necessary component of any decision-making regarding Great Lakes water quality. In their own countries, NGOs consistently lobbied for an active role in federal, state, and provincial decision-making. They argued that the public had a compelling interest in the Great Lakes Water Quality Agreement and deserved to be heard wherever decisions about it were being made—even in formal binational negotiations. The NGOs' call for involvement was hard to ignore given the nations' relatively open political structures.

5) Transnational NGOs assert that environmental issues innately transcend jurisdictional and bureaucratic boundaries. The presence of environmental issues, therefore, compels the development of transnational (as distinct from bi- or multinational) features within the structure of the negotiations. The new transnational character, combined with the NGOs' knowledge of governments' internal strategies and resources, lends NGOs more power and authority in international negotiations than they have traditionally possessed.

Indeed, although the NGO GLWQA representatives were invited simply as "observers," they played an active role in both the preparation of positions in the separate U.S. and Canadian caucuses, and in the formal bilateral talks. Great Lakes United representatives had, as a

result of the organization's binational character, certain advantages over other, more official, participants. Their very presence, on both sides of the negotiating table, affirmed the cross-boundary nature of the issues and challenged the presumption of separate national interests built into the structure of binational negotiations. As the only binational spokespersons present, Great Lakes United's status in the negotiations depended on the Parties' appreciation of the issues as binational. On a more practical level, their knowledge of both sides' positions, their familiarity with most of the negotiators, and their appreciation for the inter- and intra-agency politics on both sides of the border, gave them a more heightened understanding of the issues than most members of either delegation. At the negotiating session itself, each nation's senior diplomat followed the protocol of welcoming one another, after which the floor was turned over to Great Lakes United for comment. Although the government participants understood this to be "good manners and courtesy,"<sup>154</sup> this recognition nonetheless led to the appearance that the NGOs were a third party of equal status in the negotiations.

6) International environmental negotiations may be carried out by individuals who, although representing different nations, have considerable experience working with each other and dealing with their shared interests. As such, personalities will often play as large (if not larger) a role in international environmental negotiations as do the organizations and positions the individuals represent. NGOs will be more effective if they develop common interests and personal relationships with the range of individuals they are attempting to influence. Common interests can be nurtured and promoted to encourage the development of an international regime of environmental problem-solving.

An accurate picture of the "sides" in these negotiations would be far more complex than described herein. Despite the formal structure of bilateral talks, states, provinces, the Army Corps of Engineers, Office of Management and Budget, Health and Welfare Canada, U.S. Fish & Wildlife Service, Environment Ontario, NGOs, and others were represented. The representatives of the Canadian and U.S. Departments of State knew each other well, as did the representatives of respective environmental agencies, the U.S. EPA and Environment Canada. These parallel agencies shared a common understanding of the issues as well as a common vocabulary. This commonality of interest is not unprecedented in the Great Lakes region, however. Ron Shimizu has pointed out that prior to the organized efforts of NGOs in the Great Lakes, an active network of Canadian and American government and

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154. Telephone Interview with Ron Shimizu, *supra* note 116 (Aug. 20, 1991).

non-government scientists played a similar role to that of the NGOs in this case.<sup>155</sup> The scientist network, Shimizu recounts, was initiated by the IJC and the governments during the binational water quality studies of the 1960s and 1970s. Scientists felt an allegiance to not only their countries, but to a scientific principle: the ecosystem approach.<sup>156</sup> Kent Fuller noted that the community of scientists and professionals working on shared problems provides transboundary commonality and even loyalty that helps the process of international environmental negotiations.<sup>157</sup> The NGOs differed only in that they politicized the scientific principle and adopted, self-consciously, political strategies for implementing the ecosystem approach. Commonality and loyalty were undoubtedly effective themes for the NGOs in the 1987 Protocol negotiations as well.

7) International agreements can lead to unforeseen domestic consequences. For NGOs, gaining influence in international agreements can be an effective strategy for influencing domestic environmental law and policy. The legal standing of the agreement or treaty, and the possibilities for influencing a domestic agenda will vary by nation. Success, however, will increase the political stakes and attract the organized interests of polluting industries with their substantial political and economic clout to international environmental negotiations.

At the 1987 Protocol negotiations, representatives of industrial and commercial interests were noticeably absent from the review and amendment processes. This absence reflects that industry representatives usually focus the resources and energy of their environmental personnel on state and provincial regulations. They take their concerns to the courts where decisions have an immediate financial impact. Because the GLWQA lacked the force of domestic law, industry was not inclined to spend time on questions of definitions, accountability, and goals. However, industries' absence from the process may prove costly to them. Recent laws passed in the United States refer specifically to the GLWQA and require compliance with its provisions.<sup>158</sup> Hence, by the time industrial lobbyists are fending off new and costly regulation, they will find their opponents' cases are strengthened by the weight of

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155. *Id.*

156. *Id.*

157. Interview with Kent Fuller, *supra* note 23, in Ann Arbor, Mich. (Oct. 19, 1991).

158. See, e.g., The Great Lakes Critical Programs Act of 1990, Pub. L. No. 101-596, § 1, 104 Stat. 3000 (codified at 33 U.S.C. § 1268 (Supp. 1990)).

international commitments. In the Great Lakes region, this has proven to be a very effective legal strategy.

8) As the influence of international environmental agreements grows stronger, more interests will demand access to and participation in their negotiation. The formal mechanisms of international negotiations have a limited capacity to accommodate varied interests and their representatives. As a result, new forms of intergovernmental, transnational, and nongovernmental processes will be invented. NGOs should give consideration to proposals for new forums for public participation in international politics.

In the future, particularly if the GLWQA appears to be driving Great Lakes policies at the state and provincial regulatory level, it is likely that GLWQA negotiations will receive more attention. Other interest groups, like industry or associations of local governments, may demand representation. The Parties will have difficulty limiting representatives. Increased numbers, particularly of interests which do not share in the ecological assumptions underlying the Agreement, may make the negotiating process unwieldy. The Parties may reasonably ask, "If we invite GLU, why not others? Where do we draw the line?" Hence, some new format, such as the "round table discussions" frequently held in Canada, or other public participation mechanisms, may be adopted instead of officially inviting NGOs to participate.

9) Lastly, the relationship between NGOs and international governmental organizations (IGOs) is complex and full of hazards. IGOs gain their legitimacy and authority from governments and must work with governments to accomplish their ends. Conversely, NGOs often work outside government channels, frequently in opposition to national governments. However, in global environmental politics, NGOs and IGOs have a strong mutual interest in creating effective mechanisms for international decision-making. The ideology of volunteerism is appealing to NGOs. They would argue that nation-states are unable to act effectively in international environmental arenas, and, therefore, the task of environmental management belongs to the independent sector and voluntary organizations. In developing strategies for participation in world environmental politics, NGOs should develop a clearer understanding of where their interests mesh with IGOs' interests and consider those areas when dealing with governments and corporate sectors.

One unintended but predictable result of the 1987 Protocol was a pronounced withdrawal by the national governments from the International Joint Commission. In preparing for the negotiations, the NGOs appeared to give very little, if any, consideration to the role of the IJC as an independent international organization whose mandate was to

monitor progress in achieving the Agreement's ends. In general, the approach taken by NGOs toward the IJC was one of lobbying and politicization of the IJC's role. The NGOs frequently pushed the IJC to take strong adversarial positions *vis-a-vis* the governments, while the IJC often looked to the NGOs to raise difficult political issues the IJC could not. The NGOs were used to create a constituency with political clout in order to help implement IJC recommendations. Both the NGO and the IJC viewed each other as natural allies. Neither side, however, gave much consideration to how their mandates and objectives might be juxtaposed at times. The NGOs' lack of consideration of the IJC's role may ultimately lead to a weakening of the IJC's stature as an effective international organization. This could be a dangerous concession to conservative politicians and bureaucrats eager to reign in the IJC as an authoritative voice for environmental protection and regulation. Caution should be exercised by NGOs so as not to jeopardize their profitable relationships with IGOs.

In sum, one thing is certain. The international politics brought about by ecosystem concerns are here to stay. However we interpret their meanings, or imagine their outcomes, they will remain interesting and likely to affect our lives in profound ways.

